Supreme Court, U.S.
FILED

09-700 DEC 14 2009

OFFICE OF THE CLERK

No. 09-____

IN THE
Supreme Court of the United States

HOMAIDAN AL-TURKI,
Petitioner,

v.

COLORADO,
Respondent.

On Petition for Writ of Certiorari
to the Colorado Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Harold A. Haddon
Ty Gee
Jason Middleton
HADDON, MORGAN AND
FOREMAN P.C.
150 East 10th Avenue
Denver, CO 80203

Jeffrey L. Fisher
Counsel of Record
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Pursuant to the Due Process Clause and the Sixth Amendment's guarantee of an impartial jury, a trial court must allow probing of a potential juror at *voir dire* for possible bias when there is a "significant likelihood" that racial or similarly invidious prejudice might infect the juror's deliberations. *Ristaino v. Ross*, 424 U.S. 589, 598 (1976); *accord Turner v. Murray*, 476 U.S. 28 (1986); *Ham v. South Carolina*, 409 U.S. 524 (1973). In this case, petitioner, an Arab Muslim who faced an ethnically and religiously infused prosecution on charges punishable by life in prison, sought to probe the views of a juror who stated during *voir dire* that he was "more likely to believe" a Muslim would commit a crime and that, "notwithstanding the facts presented, . . . my bias may be altered based on the belief [that petitioner] would be obeying religion versus law." App. 14a.

The question presented is whether the courts below erred in refusing to allow petitioner to probe the juror for potential bias (or to dismiss the juror for cause) on the ground that the juror's comments "did not unequivocally express actual bias." App. 16a.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 10

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Aldridge v. United States,
283 U.S. 308 (1931) 11, 18

Carrillo v. People,
974 P.2d 478 (Colo. 1999) 8, 9, 16, 17

Dennis v. United States, 339 U.S. 162 (1950) 10

Dye v. Hofbauer, 546 U.S. 1 (2005) 16

Fisher v. State, 481 So.2d 203 (Miss. 1985) 17

Ham v. South Carolina,
409 U.S. 524 (1973) ..... passim

Maryland v. Dyson, 527 U.S. 465 (1999) 15

People v. Wilson
114 P.3d 19 (Colo. App. 2004) 16

Ristaino v. Ross, 424 U.S. 589 (1976) ..... passim

Rosales-Lopez v. United States,
451 U.S. 182 (1981) 10, 12, 18

Turner v. Murray, 476 U.S. 28 (1986) ..... i, 13

Wainwright v. Witt, 469 U.S. 412 (1985) 17

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 9

U.S. Const. amend. VI ..... i, 1, 9, 10

U.S. Const. amend. XIV 1, 9, 14

STATUTE

28 U.S.C. § 1257(a) 1

OTHER AUTHORITIES

1 The New Shorter Oxford English Dictionary 223 (1993) 15

Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and "Terrorist" Trials*, 78 Chi.-Kent L. Rev. 1143 (2003) 17

PETITION FOR A WRIT OF CERTIORARI

Petitioner Homaidan Al-Turki respectfully petitions for a writ of certiorari to review the judgment of the Colorado Court of Appeals in this case.

OPINIONS BELOW

The Colorado Court of Appeals' opinion, App. 1a, is unreported, although the decision is noted at 2009 WL 147006. The order of the Colorado Supreme Court denying review of that decision, App. 30a, is unreported, although it can be found at 2009 WL 2916999.

JURISDICTION

The Colorado Supreme Court denied review in this case on September 14, 2009. App. 30a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part, that "the accused shall enjoy the right to a . . . trial [] by an impartial jury of the State and district wherein the crime shall have been committed."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

This case presents an important issue involving the right of a criminal defendant to obtain the benefit of trial by an impartial jury.

1. Petitioner Homaidan Al-Turki is a Saudi Arabian citizen who moved to the United States in 1995. He settled near Denver, and, until the prosecution at issue here, was pursuing a Ph.D in linguistics at the University of Colorado. He lived with his wife and five children, two of whom are U.S. citizens. Petitioner also opened and operated a bookstore that sold Islamic texts and merchandise.

Unbeknownst to petitioner, the federal government began closely monitoring him in 2001 or 2002, based on his national origin and traditional Muslim beliefs. This surveillance lasted for years, but the federal government never charged him with any crime. As part of this surveillance, however, the federal government learned that petitioner had a live-in housekeeper from Indonesia, Z.A., and that her work visa was expired. On November 19, 2004, federal officials arrested and jailed Z.A. on immigration violations. These violations gave the federal government the power to deport her.

Over the course of five months, federal agents repeatedly interrogated Z.A., seeking to uncover evidence that petitioner was involved in some kind of wrongdoing. During over a dozen consecutive interviews (with FBI agents, counselors, and an Indonesian consular official who spoke with Z.A. in her native language), Z.A. denied being aware of any

malfeasance and told federal authorities that petitioner's family treated her well. Among other things, federal agents repeatedly asked Z.A. if petitioner had sexually assaulted her, and she repeatedly said no.

On April 7, 2005, however, Z.A. alleged for the first time that she had been sexually abused by petitioner for the previous four years. She also claimed that petitioner had refused to pay her for much of the work she performed. The next day, she signed an application for U.S. work authorization. The government granted the application shortly thereafter, allowing her to avoid deportation and stay and work in the United States.

2. The State of Colorado charged petitioner with twelve counts of aggravated sexual assault; kidnapping; conspiracy to commit first-degree kidnapping; criminal extortion; and false imprisonment. Petitioner maintained his complete innocence, and the case proceeded to trial.

A pool of 106 potential jurors was selected for the case. Even though the parties' positions made clear at the outset that ethnically and culturally sensitive issues would be threaded throughout the case, the trial judge tightly restricted *voir dire*. After distributing a basic jury questionnaire that informed the jurors that the defendant and the victim in the case were "Muslims from the Middle East and Indonesia," App. 20a, the judge described the charges to the venire members and told them that petitioner "says he did not commit these crimes." Tr. 2582. The judge then posed the generic question to all 106

venire members simultaneously whether they could be "fair and impartial" in the case. The trial court deemed all of the jurors who failed to say anything as qualified to serve. The parties were then given 45 minutes to question the jury pool and to exercise their peremptory challenges.

Twelve people were selected to serve on the jury. As the court began to swear in the jury, one of the twelve, Juror C.M., interrupted the proceedings to ask a question:

> Before I take this oath, can I ask one question that I didn't address previously because I was under the impression that it really wouldn't matter. But with respect to the religious issue that has come to light in this, it appears what comes to light in what would be this trial, if I'm more likely to believe a person of faith would commit a crime if it conflicted – if the faith conflicted with the laws of our government. It being said that the Muslim religion will be at issue here, it is my understanding that the laws of God are higher than the laws of man. Would it be a bias that I have or would that be consistent with the Muslim religion?

App. 13a. The trial court responded by telling Juror C.M. in simple terms that he had a duty to base his decision on the evidence and applicable legal principles. Juror C.M. nonetheless persisted:

> What I say, *notwithstanding the facts presented,* if it came to a situation where it was a he said, she said issue, *my bias may be*

> *altered based on the belief he would be obeying religion versus law.*

App. 14a (emphasis added). After the trial court repeated its previous boilerplate admonition, Juror C.M. tried a third time to ascertain whether his predisposition was legally disqualifying:

> I guess at this time I may have some issue with that religion based on my belief that it is fundamentally my belief the laws of this country – and I'm concerned that I don't know – *I guess I'm presenting you what I may or may not have a bias going into this case*, and I'm – *I just don't know if that would be considered bias* or that would be considered factually consistent with religion that may be at hand here.

Tr. 2756, quoted in part at App. 14a (emphasis added).

At this point, petitioner requested leave to question Juror C.M. further about his views toward Islamic religion. The trial court denied that request. Petitioner then asked that the court excuse the juror for cause. The trial court denied that request too. Because petitioner had used all of his peremptory challenges, Juror C.M. then was seated, over defense objection, on the jury without any further questioning.

As indicated during pretrial proceedings, the prosecution sought to prove its allegations at trial by constant reference to Islamic culture and supposed Muslim practices. In opening statements, the

prosecution cast petitioner's requirement that Z.A. dress in traditional Muslim attire while in his house as indicative of his guilt. For example, the prosecution argued that the Muslim requirement that Z.A. cover her face made her "invisible" as a person, put her in "isolation," and, indeed, made her an "invisible prisoner." Tr. 2792. The prosecution explained to the jury "the People are asking you . . . to make her visible again." Tr. 2803.

The prosecution did not introduce any physical or forensic evidence to support its allegations. Nor did it offer any eye or ear witnesses testimony concerning its sexual assault allegations from anyone other than Z.A. Instead, it rested on Z.A.'s statements, and it introduced evidence concerning purported Muslim culture to explain why Z.A. never accused petitioner of any wrongdoing during the years the acts were supposedly committed. For instance, the prosecution brought a mannequin dressed in Muslim women's clothing into court to show the jury how petitioner required Z.A. to dress. It also questioned Z.A. extensively on the restrictive nature of such clothing. What is more, the prosecution called an expert witness in "Islamic and Muslim culture" and "women's issues." Explaining to the jury that her opinions derived in part from familiarity with the family of Osama bin Laden, the witness harshly critiqued Islam's general treatment of women. She claimed, for example, that "[i]n Islamic jurisprudence" in Saudi Arabia, women are "punished" for reporting sexual assault through "house arrest" or "honor killing." Tr. 3441-42. A rape, the witness added, could be "corrected" by having the victim marry the perpetrator. Tr. 3441.

The prosecution pushed these anti-Islamic themes still further in closing argument. It suggested that petitioner had been living in the United States long enough to "know[] the rules here," and that he had transgressed some norm that live-in housekeepers "aren't told what to wear." Tr. 2115. The prosecution further claimed that petitioner was "holding [Z.A.] captive," Tr. 2118, and required her to perform "extra assignments" such as entertaining during "Ramadan." Tr. 2121. The prosecution even referred to the September 11 terrorist attacks, arguing that Z.A. was so isolated that she did not even know about those events until considerably after they occurred. Tr. 4219-20.

The defense claimed in closing that Z.A. had lied to the federal agents, after months of prodding, to avoid deportation and objected that the "premise" of the whole prosecution was really "Islamophobia." Tr. 2137. "You're being asked," the defense suggested to the jury, "to select the deeply held beliefs of Mr. Al-Turki and his family and indeed those belonging to about a billion people on the planet, one of the world's great religions, and selectively take those instead of evidence instead of [proof] and say that they intended to use practices and to make this woman invisible, to subjugate her, to imprison her." Tr. 2137. The defense urged the jury not to give into "fear" concerning "cultural issues" and to acquit for the lack of "hard evidence" indicating that petitioner had committed any crimes. Tr. 2137-38.

The jury acquitted petitioner of the kidnapping charges. It also acquitted him of the aggravated sexual assault charges. But it convicted him of

twelve counts of the lesser included offense of unlawful sexual contact. It also convicted him of false imprisonment, conspiracy to commit false imprisonment, and criminal extortion. The trial court sentenced him to the maximum term of twenty-eight years to life in prison.

3. Petitioner appealed, arguing among other things that the trial court's limitations on *voir dire* – especially its refusal to allow questioning of C.M. – "denied Mr. Al-Turki his rights to a fair trial by an impartial jury and due process under the Sixth and Fourteenth Amendments to the U.S. Constitution." Deft's C.A. Br. 20 (opening paragraph of argument). After developing that claim in his brief, petitioner further contended that the trial court "violat[ed] Mr. Al-Turki's rights to due process and a fair trial by an impartial jury. *See Ham v. South Carolina*, 409 U.S. 524, 527 (1973) (due process requires that defendant be permitted to question prospective jurors about potential race bias in cases where facts raise racial issues)." Deft's C.A. Br. 40.

The Colorado Court of Appeals rejected this argument and affirmed. It did not dispute that ethnically and religiously charged contentions were at the core of petitioner's case. But the court of appeals reasoned that petitioner was not entitled to question Juror C.M. about those issues because "Juror C.M.'s comments did not unequivocally express actual bias against defendant or his religion." App. 16a. The court of appeals supported that holding by citing to *Carrillo v. People*, 974 P.2d 478 (Colo. 1999), in which the Colorado Supreme Court held that a trial court need not allow further

questioning of a juror unless the juror "articulate[s] a clear expression of bias." *Id.* at 488.

4. Petitioner sought discretionary review in the Colorado Supreme Court. In the first paragraph of his argument, he contended: "The trial court's refusal to permit further questioning or, alternatively, excuse the juror for cause violated Mr. Al-Turki's constitutional rights to due process and to a fair and impartial jury. U.S. Const. amends. V, VI, XIV." Deft's Pet'n for Cert. 6. The State opposed review, asserting that "it is clear that by stating that Juror C.M. 'did not unequivocally express actual bias,' the court of appeals meant exactly what [the Colorado Supreme] Court meant in stating in *Carrillo* that the challenged juror did not 'articulate a clear expression of bias requiring his dismissal.'" State's Opp. to Cert. 9.

The Colorado Supreme Court denied review, with one justice stating that he would have granted review to address two of petitioner's claims, including his claim regarding *voir dire*. App. 30a-31a.

5. This petition follows.

REASONS FOR GRANTING THE WRIT

This Court repeatedly has made clear that a trial court must allow a defendant in a criminal case to probe prospective jurors for bias whenever there is a "significant likelihood" that racial or similarly invidious prejudice might infect the juror's deliberations. Here, at the outset of an ethnically and religiously infused prosecution, petitioner sought to question a potential juror who interrupted the taking of his oath to say he was biased against Muslims. The trial court, however, rejected this request for questioning, and the Colorado Court of Appeals affirmed, holding that the juror's comments "did not unequivocally express actual bias." App. 16a. This decision, which follows others in Colorado, so clearly and consequentially departs from the Constitution's "significant likelihood" standard as to require this Court's intervention.

1. Although the Constitution generally leaves *voir dire* to the sound discretion of trial judges, "[t]here are . . . constitutional requirements with respect to questioning prospective jurors about racial or ethnic bias." *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981). Specifically, "[p]reservation of the opportunity to prove actual bias is a guarantee of the defendant's [Sixth Amendment] right to an impartial jury." *Dennis v. United States*, 339 U.S. 162, 171-72 (1950); *accord Ristaino v. Ross*, 424 U.S. 589, 597 (1976). The Due Process Clause's guarantee of "essential fairness" likewise requires courts to provide defendants with an adequate opportunity to ferret out invidious bias during *voir dire*. *Ham v. South Carolina*, 409 U.S. 524, 527 (1973); *see also*

Aldridge v. United States, 283 U.S. 308, 314-15 (1931) (equating "religious prejudices" with racial and ethnic bias in this respect). Without an adequate opportunity to probe for bias, a defendant cannot effectively use his peremptory challenges, and trial courts cannot intelligently rule on motions to strike jurors for cause.

In a series of cases, this Court has established a clear standard for resolving disputes in this respect. This first such case is *Ham*. There, the State of South Carolina charged a black man "known locally" for his work in civil rights activities with a drug crime. 409 U.S. at 525. The accused's "basic defense at the trial was that law enforcement officers were 'out to get him' because of his civil rights activities, and that he had been framed on the drug charge." *Id.* The trial court, however, refused to allow the defendant to ask the prospective jurors whether they might be biased or prejudiced against African Americans. The state supreme court upheld this decision.

In an opinion by then-Justice Rehnquist, this Court unanimously reversed. This Court reasoned that "under the facts shown by this record," the Constitution required the trial court to allow the defendant "to have the jurors interrogated on the issue of racial bias." *Id.* at 527. As this Court later explained at greater length, the *Ham* decision "reflected an assessment of whether under all of the circumstances presented there was a constitutionally *significant likelihood* that, absent questioning about racial prejudice, the jurors would be not as 'indifferent as [they stand] unsworne.'" *Ristaino*, 424

U.S. at 596 (emphasis added) (quoting Coke on Littleton 155b (19th ed. 1832)). When "[r]acial issues . . . [a]re inextricably bound up with the conduct of the trial," it is likely to "intensify any prejudice that individual members of the jury might harbor" and it becomes necessary to allow questioning of potential jurors "to meet the constitutional requirement that an impartial jury be impaneled." *Id.* at 597.

Not all, or even many, disputes over the scope of *voir dire* in racially or ethnically charged cases end up triggering a constitutional dispute. This Court, as a matter of its supervisory authority over federal courts, requires federal district courts to allow probing for bias whenever there is a "reasonable possibility" that invidious prejudice might influence the jury. *Rosales-Lopez*, 451 U.S. at 182. Many state court systems, following guidelines established by the American Bar Association, similarly allow such probing as a matter of state law or allow challenges for cause whenever there is a "reasonable doubt that the juror can be fair and impartial." ABA Principles for Jury Trials, Principle 11.C.3 (adopted 2005).

But in cases following *Ham*, this Court has steadfastly insisted on the "significant likelihood" of bias test as a constitutional floor, demanding that trial courts allow questioning of potential jurors whenever it is satisfied. *See Ristaino*, 424 U.S. at 598 (rejecting constitutional claim of inadequate *voir dire* because "[t]he circumstances thus did not suggest a *significant likelihood* that racial prejudice might infect Ross' trial") (emphasis added); *Rosales-Lopez*, 451 U.S. at 190 ("[W]hen there are more

substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case" than the races of the defendant and the victim, "the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount[s] to an unconstitutional abuse of discretion.") (emphasis added); *Turner v. Murray*, 476 U.S. 28, 33 (1986) (plurality opinion) ("The broad inquiry in each case must be . . . whether under all of the circumstances presented there was a constitutionally *significant likelihood* that, absent questioning about racial prejudice, the jurors would not be indifferent as [they stand] unsworne.") (emphasis added and internal quotation omitted).

2. The Colorado Court of Appeals in this case improperly ignored the constitutional "significant likelihood" test. Just like the defendant in *Ham*, petitioner stood trial as a member of a persecuted minority, who was locally known for his ethno-political views (in petitioner's case, by way of his bookstore). *See supra* at 2, 5-7 (detailing the facts of the prosecution). Just like the defendant in *Ham*, petitioner defended himself on the ground that the State was prosecuting him on the basis of his ethno-political beliefs and activities. Petitioner argued at trial that the prosecution was propounding ethnic prejudices ("Islamophobia") in place of actual evidence of guilt. *See supra* at 7. Just like in *Ham*, therefore, "[r]acial issues . . . were inextricably bound up with the conduct of the trial." *Ristaino*, 424 U.S. at 597.

Indeed, there is more cause for concern here than in *Ham*, for the prosecution itself injected ethnicity

into the case by arguing that petitioner's Islamic practices subjugated the alleged victim and explained why she had failed to accuse him of any wrongdoing until arrested and faced with deportation. The prosecution even called an expert witness in Muslim culture and Islam's general treatment of women. Worse yet, one juror here, Juror C.M., actually acknowledged his bias right before being sworn in. The potential juror suggested that based on his assumptions about Muslims, he would be "more likely to believe a person of [Islamic] faith would commit a crime if conflicted – if the faith conflicted with the laws of our government." App. 13a. The potential juror also told the trial court that "notwithstanding the facts presented . . . my bias may be altered based on the belief [that petitioner] would be obeying religion versus law." App. 14a. Yet even then, the trial court refused to allow petitioner to question the juror for potential bias (and also refused to strike the juror for cause).

Petitioner clearly and unambiguously argued on appeal, citing *Ham*, that the trial court's refusal to allow such questioning "denied Mr. Al-Turki his rights to a fair trial by an impartial jury and due process under the Sixth and Fourteenth Amendments to the U.S. Constitution." Deft's C.A. Br. 20; *see also* Deft's C.A. Br. 40 ("The trial court's" restrictions on *voir dire* "violat[ed] Mr. Al-Turki's rights to due process and a fair trial by an impartial jury."). But the Colorado Court of Appeals rejected this argument, on the ground that the juror's comments "did not *unequivocally express actual bias* against the defendant or his religion." App. 16a (emphasis added).

Even if this characterization of the juror's comments as less than an "unequivocal" expression of bias were accurate (itself a highly contestable point[1]), the Colorado Court of Appeals decided this case on the basis of the wrong standard. A defendant need not show that a potential juror is "unequivocally" ethnically or religiously biased against him in order to be permitted to probe that juror's views. Rather, the Constitution requires a trial court to allow such probing whenever there is a "significant likelihood" of prejudice. *E.g., Ristaino*, 424 U.S. at 598. The facts surrounding this prosecution and petitioner's defense alone met that standard, and Juror C.M.'s comments erased any doubt that at least questioning of that juror was necessary.

3. The stark incompatibility between the Colorado Court of Appeals' decision and this Court's precedent may suggest that summary reversal is more appropriate than a full review on the merits. *See, e.g., Maryland v. Dyson*, 527 U.S. 465, 466-67 (1999) (summarily reversing state intermediate court decision in criminal case that used wrong test to resolve federal constitutional claim). But for three

---

[1] The definition of bias is a "predisposition" to believe that members of an ethnic group are more likely to engage in certain *behavior. 1 The New Shorter Oxford English Dictionary 223* (1993). That is exactly how Juror C.M. described his views; he said he would be "more likely to believe a person of [Islamic] faith would commit a crime if conflicted – if the faith conflicted with the laws of our government." App. 13a. The only thing about which Juror C.M. was less than clear, since he was not a lawyer, was whether he believed his predisposition against Muslims rendered him legally unable to be a fair and impartial juror in the case.

reasons, it is critical that this Court take some kind of action here.

First, the integrity of the federal Constitution and this Court's decisions is at stake. Abiding by the etiquette of federalism, petitioner challenged the trial court's refusal to allow questioning of the potentially biased juror primarily on state-law grounds. But there can be no doubt that petitioner also fairly raised a federal constitutional objection to the trial court's actions in the Colorado Court of Appeals and the Colorado Supreme Court. *See supra* 8-9. Now that the Colorado courts have declined to afford relief on state-law grounds and have refused to follow the federal Constitution's minimum requirements in this area, it is incumbent on this Court to ensure that *some* court apply the proper federal standard to petitioner's obviously meritorious claim. *See Dye v. Hofbauer*, 546 U.S. 1, 3 (2005) (per curiam) (summarily reversing when defendant fairly raised federal claim but lower courts ignored it).

Second, the decision below shows that Colorado courts are apparently unwilling to follow the federal "significant likelihood" standard. In rejecting petitioner's claim, the Colorado Court of Appeals cited *Carrillo v. People*, 974 P.2d 478 (Colo. 1999), in which the Colorado Supreme Court held that a trial court need not allow further questioning of a juror unless the juror "articulate[s] a clear expression of bias." *Id.* at 488. Other Colorado appellate decisions are in accord. *See, e.g., People v. Wilson* 114 P.3d 19, 25 (Colo. App. 2004) (requiring "unequivocal[]" showing of bias). Thus, as the State put it in this case: "[I]t is clear that by stating that Juror C.M. 'did

not unequivocally express actual bias,' the court of appeals meant exactly what [the Colorado Supreme] Court meant in stating in *Carrillo* that the challenged juror did not 'articulate a clear expression of bias requiring his dismissal.'" State's Opp. to Cert. in Colo. S. Ct. 9 (quoting *Carrillo*). The court of appeals apparently perceived the law in Colorado as so settled that it was unnecessary to publish this opinion. It is time for this Court to step in.

Third, Colorado's substitution of an "unequivocal express[ion of] actual bias" standard for the Constitution's "significant likelihood" causes real harms. Most immediately, it harms defendants. In the context of death-qualifying jurors, this Court has observed: "What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear.'" *Wainwright v. Witt*, 469 U.S. 412, 424-25 (1985). This is particularly so in the context of ethnic prejudice. As "empirical findings" have demonstrated, "the average potential juror will be extremely reluctant to disclose his biases" at all, much less in unambiguous terms. *Fisher v. State*, 481 So.2d 203, 220 (Miss. 1985). Indeed, "[s]ome prospective jurors who hold biases are likely to state that they can be impartial solely because that answer is consistent with socially learned values that people should be impartial." Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and "Terrorist" Trials*, 78 Chi.-Kent L. Rev. 1143, 1150 (2003). The Constitution's "significant likelihood" standard deals in probabilities instead of certainties in order to account for such realities.

The State's impossibly high hurdle for probing potential jurors for invidious bias also impairs the public's perception of the criminal justice system. This Court has explained:

> The argument is advanced on behalf of the Government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. *No surer way could be devised to bring the processes of justice into disrepute.*

Rosales-Lopez, 451 U.S. at 191 (plurality opinion) (quoting *Aldridge*, 283 U.S. at 314-15) (emphasis added). This Court should reaffirm that our Constitution does not tolerate ethnic or religious prejudices of any kind to infect our jury boxes.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Harold A. Haddon
Ty Gee
Jason Middleton
HADDON, MORGAN AND FOREMAN P.C.
150 East 10th Avenue
Denver, CO 80203

Jeffrey L. Fisher
Counsel of Record
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

December 14, 2009

APPENDIX

APPENDIX A

COLORADO COURT OF APPEALS

Court of Appeals No.: 06CA2104
Arapahoe County District Court No. 05CR1571
Honorable Justin M. Hannen, Judge

The PEOPLE of the State of Colorado,
Plaintiff-Appellee,

v.

Homaidan AL-TURKI,
Defendant-Appellant.

JUDGMENTS AFFIRMED

Division VI
Opinion by Judge HAWTHORNE.
TERRY and MÁRQUEZ*, JJ., concur.

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: January 22, 2009

John W. Suthers, Attorney-General, Majid Yazdi, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Haddon, Morgan, Mueller, Jordan, Mackey & Foreman, P.C., Harold A. Haddon, Ty Gee, Gail K. Johnson, Denver, Colorado, Richilano & Gilligan, P.C., Marci A. Gilligan, Denver, Colorado; Recht & Kornfeld, P.C., Daniel N. Recht, Denver, Colorado; Robert T. Fishman, Denver, Colorado, for Defendant-Appellant.

---

* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2009.

We affirm the judgments of conviction entered against defendant, Homaidan Al-Turki, on jury verdicts finding him guilty of false imprisonment, conspiracy to commit false imprisonment, criminal extortion, theft, and twelve counts of unlawful sexual contact.

I. CONCLUSIONS

A. The evidence before the jury was sufficient to support the jury's findings that defendant was guilty of theft and unlawful sexual contact.

B. The trial court did not err in denying three of defendant's challenges for cause because the three prospective jurors did not evince actual bias toward defendant.

C. The trial court did not abuse its discretion in restricting the parties' voir dire of prospective jurors to fort-five minutes per party because the court conducted its own voir dire and had the jurors complete two questionnaires before imposing the time restriction.

D. The trial court did not commit plain error by declining to include in the interrogatories for unlawful sexual contact the exact language listed in section 18-3-402(4)(a)-(c), C.R.S. 2008, governing enhancement of the crime because (1) the omission of the statutory language explaining the terms "force," "intimidation," and "threat" was harmless, and (2) the definitions of "cause" and "compel" are nearly identical.

E. The trial court did not abuse its discretion by permitting the prosecution to interrupt the victim's direct examination to present an expert witness who allegedly bolstered the victim's testimony because the interruption did not deprive defendant of his right to effectively cross-examine the victim.

II. FACTS

Defendant is a Saudi Arabian citizen who has resided in the United States since 1995. The victim is an Indonesian citizen who was brought to the U.S. by defendant to work for him and his family as a domestic servant. She worked for them from September 2000 until her arrest on immigration violations in November 2004.

While in custody for her alleged immigration violations, the victim told investigators that she had been repeatedly sexually assaulted by defendant. She also stated that defendant paid her only a fraction of the money to which she was entitled for working as his domestic servant. Defendant was arrested and charged with various crimes stemming from the victim's allegations.

III. ANALYSIS

A. Sufficiency of Evidence

Defendant contends that the evidence presented by the prosecution was insufficient as a matter of law to

support the jury's findings that he was guilty of theft and unlawful sexual contact. We disagree.

In reviewing a challenge to the sufficiency of the evidence, we consider the evidence in the light most favorable to the People, giving the People the benefit of every reasonable inference that might be drawn from the evidence. *People v. Howard,* 89 P.3d 441, 444 (Colo. App. 2003).

1. Theft

As relevant here, section 18-4-401(1)(a), C.R.S. 2008, provides:

> (1) A person commits theft when he knowingly obtains or exercises control over anything of value of another without authorization, or by threat or deception, and:
> (a) Intends to deprive the other person permanently of the use or benefit of the thing of value.

Defendant argues that the prosecution did not present sufficient evidence that (1) defendant exercised unauthorized control of the wages the victim earned while she was in the U.S., and (2) he intended to permanently deprive her of those wages.

a. Unauthorized Control

Exercising control over property "without authorization" means that the owner of the property has not given the defendant permission to exercise

control over it. *People v. Gracey*, 940 P.2d 1050, 1052 (Colo. App. 1996).

Here, the victim testified that she was told by the agency that arranged her employment with defendant's family that she would be paid 600 Saudi riyals once a month. According to the victim, she did not have a problem with defendant's family holding her wages for her, but she "just wanted them to send it [to her parents in Indonesia] when . . . requested" and she "would ask for help to please send th[e] money." She also testified, "[T]he issue of . . . holding my money is not a problem as long as they would have sent it to my parents, who need it," and "it is okay with me if they hold my money. But if I ask to send my money, they should send money."

The victim further testified that despite her repeated requests, defendant only sent $1,000 to her parents, and his wife only paid the victim $500. Yet $1,500 was only a fraction of the money the victim was owed. She also testified that she was promised that more money would be sent, but it never was; and, on two occasions, defendant falsely told the victim that money had been sent.

One of defendant's friends also testified that defendant stated that he sent the victim's compensation home to her parents in Indonesia every month or every other month. Furthermore, defendant's secretary and his wife's driver testified that defendant stated that he paid her $1,200 per month, which he sent to her family in Indonesia. The victim also testified that defendant instructed her to

tell authorities that he sent $ 800 per month to her parents in Indonesia, even though he did not do so.

Considering this evidence in the light most favorable to the prosecution, the jury could properly find that defendant was only authorized to hold the victim's wages until she asked that they be sent to her family in Indonesia and that defendant did not send the money when asked to do so. Accordingly, the evidence was sufficient to support the jury's finding that defendant held the victim's wages without authorization. *See Gracey*, 940 P.2d at 1052.

b. Intent to Permanently Deprive

An intent to permanently deprive another of his or her property may be inferred from a defendant's conduct and the circumstances of the case. *People v. Pedrie*, 727 P.2d 859, 862 (Colo. 1986).

Citing *People v. McClure*, 186 Colo. 274, 277, 526 P.2d 1323, 1324 (1974), defendant argues that he would have paid the victim her remaining wages at the end of her term of employment if not for his incarceration. Thus, he contends that he did not intend to permanently deprive her of her wages.

However, as discussed, the victim testified that despite her repeated requests, defendant only sent $1,000 to her parents, and his wife only paid the victim $500. Yet, because she worked for defendant's family seven days a week for roughly four years, except for periods when he sent her to work for others, she was entitled to far more money, which defendant

did not send. Moreover, although defendant claims that he and his wife kept written records accounting for the waves they were allegedly holding for the victim, he did not proffer any such records. Accordingly, the evidence was sufficient for the jury to find that defendant intended to permanently deprive the victim of the remaining money to which she was entitled. *See Pedrie*, 727 P.2d at 862.

2. Unlawful Sexual Contact

Defendant argues (1) that the evidence was insufficient to find him guilty of discrete acts of unlawful sexual contact, and (2) that the evidence supporting the count tied to the act of sexual intercourse did not correspond to the date range provided in the information and thus must be vacated. We conclude that the evidence was sufficient to support the jury's verdict finding defendant guilty of unlawful sexual contact. However, we do not address defendant's argument that the sexual intercourse verdict form did not correspond to the dates listed in the information because defendant did not present this argument in his opening appellate brief.

The prosecution charged defendant with twelve counts of sexual assault. The information did not specify any particular acts, but included dates for the alleged sexual assaults: eleven of the sexual assault charges were listed as having occurred between October 1, 2003 and November 30, 2004 and one was listed as having occurred between October 1, 2002 and September 30, 2003.

The verdict forms differentiated eleven counts on the basis of the month in which they were committed (*i.e.*, consecutive months from November 2003 to May 2004 and consecutive months from August 2004 to November 2004). The remaining count was differentiated on the basis of the nature of the count (*i.e.*, sexual intercourse), but did not include a date.

At defendant's request, the verdict forms included the lesser included offense of misdemeanor unlawful sexual contact for each sexual assault count. The jury was also given a general unanimity instruction.

The jury found defendant guilty of twelve counts of unlawful sexual contact.

a. Sufficiency of Evidence

As relevant here, section 18-3-404(1)(a), C.R.S. 2008, provides,

> (1) Any actor who knowingly subjects a victim to any sexual contact commits unlawful sexual contact if:
> (a) The actor knows that the victim does not consent.

"Sexual contact" is defined as

> the knowing touching of the victim's intimate parts by the actor, or the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual

> contact is for the purposes of sexual arousal, gratification, or abuse.

§ 18-3-401(4), C.R.S. 2008. "Intimate parts" is defined as

> the external genitalia or the perineum or the anus of the buttocks or the pubes or the breast of any person.

§ 18-3-401(2), C.R.S. 2008.

Here, the victim testified that defendant began touching her sexually against her will three months after she came to the U.S. with his family. This occurred approximately between November 2000 and January 2001. She testified that the unwanted sexual contact occurred approximately once every two weeks while she and defendant's family lived in the "first house."

The victim further testified that, while living in the first house, the unwanted sexual contact included defendant removing her clothes, kissing her breasts, digitally penetrating her vagina, and rubbing his penis against her vagina. Despite the victim's verbal and physical resistance to defendant's unwanted sexual contact, defendant accomplished the unwanted contact by forcibly holding down her arms and body and, at times, holding her hair.

The victim also testified that the unwanted sexual contacts increased in frequency and severity when they moved to the "second house" in the summer of

2003. About once a week, usually on Friday nights, defendant would go to the victim's room in the basement and digitally penetrate her, or force her to perform oral sex by pushing his penis in her mouth, which the victim estimated occurred more than ten times.

The victim testified that the last incident of unwanted sexual contact occurred approximately two weeks before November 18, 2004, which was the date she was taken from defendant's house. In that incident, defendant, for the first time, had sexual intercourse with the victim, who was a virgin at the time.

The evidence was sufficient for the jury to find that defendant committed eleven acts of unlawful sexual contact that were tied to the months of November 2003 to November 2004, as listed on the jury verdict forms. *See Howard*, 89 P.3d at 444. The evidence was also sufficient for the jury to find that defendant committed the act of unlawful sexual contact that, in the jury verdict form, was tied to the act of sexual intercourse. *See id.*

b. Count Tied to the Act of Sexual Intercourse

Defendant argues that the evidence was not sufficient to support the jury verdict finding him guilty of the count of unlawful sexual contact tied to the act of sexual intercourse because there was no evidence that any sexual intercourse occurred between October 1, 2003 and November 30, 2004, the dates listed on the

information. However, because defendant did not raise this argument in his opening appellate brief, we do not address it. *See Casserly v. State*, 844 P.2d 1275, 1278 (Colo. App. 1992) (appellate court only addresses issues raised in appellant's opening brief).

B. Challenges for Cause

Defendant contends that the trial court erred in denying the challenges for cause he asserted based on alleged actual bias of three prospective jurors. We disagree because the prospective jurors did not evince actual bias toward defendant.

A trial court's denial of a challenge for cause is reviewed for an abuse of discretion, which is "a very high standard" that gives deference to the trial court's assessment of the credibility of a prospective juror's responses, "recognizes the trial court's unique role and perspective in evaluating the demeanor and body language of live witnesses," and "serves to discourage an appellate court from second-guessing those judgments based on a cold record." *Carrillo v. People*, 974 P.2d 478, 485-86 (Colo. 1999).

Section 16-10-103, C.R.S. 2008, delineates when a trial court must sustain a challenge for cause. As relevant here, the provision governing "actual bias," section 16-10-103(1)(j), provides:

> (1) The court shall sustain a challenge for cause on one or more of the following grounds:
>
> . . .

> (j) The existence of a state of mind in the juror evincing enmity or bias toward the defendant or the state; however, no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

Thus, actual bias is a state of mind that prevents a juror from deciding the case impartially and without prejudice to a substantial right of one of the parties. *People v. Lefebre*, 5 P.3d 295, 300 (Colo. 2000).

1. Juror C.M.

Defendant argues that the trial court erred in denying his challenge for cause of Juror C.M. based on the juror's actual bias toward defendant because he was Muslim and the juror's statement that he had a friend, relative, or acquaintance who had been the victim of sexual assault. However, the record does not indicate that Juror C.M. evinced actual bias toward defendant.

According to his questionnaire, Juror C.M. was scheduled to go on a business trip to Mexico the following week, which could not be rearranged without some inconvenience and possible expense. He also indicated that he had a "friend, relative, or

acquaintance" who had been a victim of sexual assault and that he had no reaction to the fact that the case involved Muslims. And, during voir dire, he did not express any prejudice relating to Islam or issues of sexual assault.

After Juror C.M. was selected to serve on the jury, defendant noted that Juror C.M. "appears somewhat agitated" and asked the court to excuse him for cause because of hardship related to his upcoming business trip. The prosecution objected, and the court denied defendant's request.

As the court began administering the oath to the jury, Juror C.M. interrupted the process, stating:

> Before I take this oath, can I ask a question that I didn't address previously because I was under the impression that really wouldn't matter. But with respect to the religious issue that has come to light in this, it appears what comes to light in what would be this trial, if I'm more likely to believe a person of faith would commit a crime if it conflicted — if the faith conflicted with the laws of our government. It being said that the Muslim religion will be at issue here, it is my understanding that the laws of God are higher than the laws of man. Would it be a bias that I have or would that be consistent with the Muslim religion? [sic]

The court responded by reminding Juror C.M. that his obligation, which "would be [his] sworn duty to carry

out," was to base his decision on the evidence presented and on legal principles given by the court.

Juror C.M. then stated: "What I say, notwithstanding the facts presented, if it came to a situation where it was a he said, she said issue, my bias may be altered based on the believe he would be obeying religion versus law." [sic] The court again explained the principle of deciding cases based on the evidence and applying the law as given by the court.

Juror C.M. responded, "I guess I'm presenting you what I may or may not have a bias going into this case, and I just don't know if that would be considered bias or that would be considered factually consistent with religion that may be at hand here." The court responded by stating that, while it could not get into specific facts or issues that might come up in the case, based on Juror C.M.'s previous indication that he could follow the law and base his decision on the evidence presented, he was qualified as a juror in this case. Juror C.M. then said, "okay."

Defendant subsequently asked the court to excuse Juror C.M. for cause or allow "extended" voir dire, which the court denied.

After the court administered the oath to the jury, the following exchange occurred:

COURT:	Mr. [C.M.], did you say I do?
JUROR C.M.	Yeah, I guess.
COURT:	Did you say I do, sir?
JUROR C.M.:	I do.

Defendant then made the following record regarding Juror C.M.'s body language during the exchange: that Juror C.M. did not initially respond to the court, that the court addressed him in a raised voice, that he shook his head either in disgust or disagreement, and that he said yes while shaking his head.

The court responded to defendant's characterization:

> For the record in that regard . . . when I was administering the oath to the jury, I didn't see Mr. [C.M.], who seemed to be showing some discomfort about serving on the jury, state that he was taking the oath. And when I asked him the first time, he shook his head and I took it in the affirmative. But I again asked him mainly because I wasn't certain he heard me the first time to indicate whether he was taking the oath. And I said, "Do you take this oath?" And, in effect, he acknowledged that he was. If any further matters arise during the trial concerning Mr. [C.M.], we certainly can address those at a later time, and that completes the court's record on this matter.

Based on these statements and exchanges, two points emerge. First, prior to his selection, Juror C.M. did not evince any concerns of bias toward defendant or the Islamic religion. His questionnaire indicated that he had no reaction to the fact that people involved in the case were Muslim. Moreover, defendant expressed no concerns when the issue was raised of

whether people from other cultures living in the U.S. should obey the laws of this country.

Second, after his selection, Juror C.M.'s comments did not unequivocally express actual bias against defendant or his religion. *See Carrillo*, 974 P.2d at 488. Instead, he inquired of the court whether it would be considered bias if he believed that a person of faith would commit a crime if that faith conflicted with the laws of the government. Moreover, in his final statement to the court, he said, "I just don't know if that would be considered bias or that would be considered factually consistent with the religion that may be at hand here." Thus, Juror C.M. was simply asking for clarification, and was not evincing a bias against defendant or his religion that would require rehabilitation. *Cf. People v. Russo*, 713 P.2d 356, 362 (Colo. 1986) (juror who expresses actual bias must be rehabilitated by subsequent examination such that the juror indicates that his original statement of actual bias was the result of mistake, confusion, or some other factor that will have no effect whatsoever on the juror's ability to render a fair and impartial verdict).

Accordingly, the trial court did not abuse its discretion in denying defendant's challenge for cause and his request for extended voir dire. *See Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000) (trial court's ruling on challenge for cause is entitled to great deference "because such decisions turn on an assessment of the juror's credibility, demeanor, and sincerity in explaining his or her state of mind"); *Carrillo*, 974 P.2d at 488 ("although it would have been better practice fo the trial judge to question [the

juror] in order to fully explore his feelings," the juror's answers taken as a whole did not demonstrate actual bias).

2. Prospective Jurors P.B. and J.J.

We also disagree with defendant's argument that the trial court erred in denying his challenges for cause as to Prospective Jurors P.B. and J.J. because they both had indicated on their questionnaires that they had been sexually assaulted in the past. Like Juror C.M., neither P.O. nor J.J. evinced actual bias.

In her juror questionnaire, Prospective Juror P.B., age fifty-two, disclosed that she had been sexually assaulted at age twenty-three, that her daughter had been sexually abused by her stepfather at age six, and that her granddaughter had been sexually assaulted at age two or three. Prospective Juror J.J., age fifty-four, disclosed in her questionnaire that she had been sexually assaulted at age twenty-five. She also indicated that a friend, relative, or acquaintance had been sexually assaulted as well.

During the court's voir dire, neither prospective juror expressed concern regarding her ability to remain impartial. Moreover, defendant did not question either juror during voir dire despite their stated willingness to discuss their experiences in open court. Defendant nonetheless challenged both prospective jurors for cause because they had been victims of sexual assault, and he requested additional time to question them individually.

The trial court denied the challenges, noting that neither of them had indicated a difficulty with being fair and impartial when the court addressed the panel about that issue. The court further ruled that it would not infer bias simply because they had been victims of sexual assault in the past. Thereafter, defendant exercised peremptory challenges against Prospective Jurors P.B. and J.J.

A prospective juror who is a victim of sexual assault is not presumed to be biased against a defendant accused of sexual assault. *See People v. Arko*, 159 P.3d 713, 722 (Colo. App. 2006) ("The fact that a prospective juror has been the victim of a crime, even one similar to that with which the defendant is charged, does not automatically require that the prospective juror be disqualified from serving on the jury."), *rev'd on other grounds*, 183 P.3d 555 (Colo. 2008). Rather, such a prospective juror must evince actual bias, which is a state of mind that prevents a juror from deciding a case impartially and without prejudice to a substantial right of one of the parties. *People v. Ellis*, 148 P.3d 205, 208 (Colo. App. 2006); *cf. People v. Luman*, 994 P.2d 432, 435 (Colo. App. 1999) (prospective juror who was a victim of sexual assault and worked as a sexual assault counselor evinced actual bias by expressly indicating that her personal, professional, and family history and experience with sexual assault would make it difficult, if not impossible, to view the evidence in an objective and unbiased manner).

Here, Prospective Jurors P.B. and J.J., as well as Juror C.M., did not evince actual bias or enmity

toward defendant. Accordingly, the trial court did not err in denying defendant's challenges for cause. *See Arko*, 159 P.3d at 722.

C. Voir Dire Time Limit

Defendant contends that the trial court abused its discretion in restricting the parties' voir dire or prospective jurors to forty-five minutes per party. We disagree because the trial court conducted its own voir dire and had the prospective jurors answer a general and case-specific questionnaires that addressed potential biases, all before the court determined the amount of time it would allow the parties to make decisions regarding juror challenges.

The right to examine prospective jurors through the voir dire process is not constitutional. *People v. Evans*, 987 P.2d 845, 847 (Colo. App. 1998), *overruled in part by Lefebre*, 5 P.3d at 302 n.5. Rather, the right is governed by Crim. P. 24, which states: "In order to minimize delay, the judge may reasonably limit the time available to the parties or their counsel for juror examination." Crim. P. 24(a)(3). Thus, although the rule permits parties or their counsel to examine potential jurors, "the trial judge can limit the extent and the nature of the questioning," *Lefebre*, 5 P.3d at 301, "[s]o long as the voir dire examination is conducted in a manner that will facilitate an intelligent exercise of challenges for cause and peremptory challenges." *People v. Rudnick*, 878 P.2d 16, 21 (Colo. App. 1993).

Trial courts are vested with broad discretion in determining the process by which voir dire will be conducted. *People v. Harlan*, 8 P.3d 448, 462 (Colo. 2000). Specifically, trial courts have considerable discretion to limit the length of questioning and its nature. *People v. Reaud*, 821 P.2d 870, 871 (Colo. App. 1991). "[A] restriction upon voir dire examination by counsel will be considered to be reversible error only if the court abuses its discretion with a prejudicial result." *Id.*

Here, before the parties' voir dire, the court required the prospective jurors to complete two questionnaires that asked the jurors' feelings on issues specifically relating to the case. For example, one question provided: "The defendant, the complaining witness, and other witnesses in this case are Muslims from the Middle East and Indonesia. Please briefly give your reaction to that fact." Another question asked: "Do you believe there is any reason why you cannot be a fair and impartial juror? If yes, please give your reasons."

After the prospective jurors completed the questionnaires, the court questioned the entire panel on the issue of hardship. The court then took a recess, giving the parties an opportunity to review the questionnaires in more detail to prepare their voir dire. Following the recess, the court questioned the prospective jurors on their ability to decide the case strictly based on the evidence presented at trial and the law provided by the court. Eight prospective jurors expressed concern about their impartiality based on pretrial publicity, familiarity with the case against

defendant's wife, personal life experiences, or circumstances of the alleged crime.

The court then asked:

> We've addressed a number of matters pertaining to your personal and business affairs, and I'm wondering if there is any other reason that you can think of at this time why if you were selected as a juror you could not or would not be fair and impartial in deciding this case? Is there anything else along those lines? Because that's [sic] a very important function of jury selection is we select jurors who will be completely fair and open-minded and impartial.

Other than the eight prospective jurors mentioned above — each of whom was eventually excused — no further jurors indicated a concern about being impartial.

Then, after noting, "We already have a good deal of information about you from your questionnaires and from the questioning that I've conducted of you this morning and early afternoon," the court determined that forty-five minutes per party was an adequate amount of time to question the ninety-seven jurors.

In light of the case-specific and general questionnaires used to gather information about the prospective jurors' biases, as well as the court's own voir dire questions that further sought to ferret out such biases, the court did not abuse its discretion by limiting the parties' voir dire to forty-five minutes per

side. *See Rudnick*, 878 P.2d at 21 (in a murder case, no abuse of discretion for court to limit voir dire to ninety minutes per party when court had conducted extensive voir dire beforehand and permitted in camera discussions with several prospective jurors); *People v. Rodriguez*, 786 P.2d 472, 473-74 (Colo. App. 1989) (in a murder case where prosecution was seeking death penalty, no abuse of discretion for court to limit voir dire to fifty minutes per group of fifteen jurors and fifty minutes for the remaining panel, when entire voir dire took four days); *People v. Binkley*, 687 P.2d 480, 483 (Colo. App. 1984) (in theft case, no abuse of discretion where defense counsel's voir dire was cut off after twenty-eight minutes of questioning), *aff'd*, 716 P.2d 1111 (Colo. 1986); *People v. Heller*, 698 P.2d 1357, 1361 (Colo. App. 1984) (in securities fraud case, no abuse of discretion for court to permit three defendants only one hour total to conduct voir dire where court had conducted its own extensive voir dire beforehand), *rev'd on other grounds*, 712 P.2d 1023 (Colo. 1986).

D. Interrogatory Language

Defendant contends that the trial court committed plain error by failing to include in the interrogatories for the unlawful sexual contact charges the exact language listed in section 18-3-404(4)(1)-(c) governing enhancement of the crime from a class 1 misdemeanor to a class 4 felony. We disagree because any such error was not plain error.

Where, as here, a defendant fails to object to a jury instruction before the instruction is given to the jury,

we review only for plain error. *People v. Miller*, 113 P.3d 743, 748-49 (Colo. 2005). Plain errors are those errors that "so undermined the fundamental fairness of the trial itself . . . as to cast serious doubt on the reliability of the judgment of conviction." *Id.* at 750 (quoting *People v. Sepulveda*, 65 P.3d 1002, 1006 (Colo. 2003)). In the context of an unpreserved claim of instructional error, the defendant bears the burden of demonstrating "not only that the instruction affected a substantial right, but also that the record reveals a reasonable possibility that the error contributed to his conviction." *Id.* (quoting *People v. Garcia*, 28 P.3d 340, 344 (Colo. 2001)).

Here, the jury instruction for the charges of unlawful sexual contact included an interrogatory that, if answered affirmatively, would enhance the crime from a class 1 misdemeanor to a class 4 felony. The interrogatory asked the jury whether it "unanimously f[ou]nd, beyond a reasonable doubt, that the defendant did *cause* submission of [the victim] by the use of *force, intimidation, or threat*" (emphasis added). The jury responded affirmatively to each such interrogatory.

Defendant, however, notes that section 18-3-404(2)(b), C.R.S. 2008, which outlines the enhancement of the crime of unlawful sexual contact, provides in relevant part: "unlawful sexual contact is a class 4 felony if the actor *compels* the victim to submit by use of such *force, intimidation*, or *threat as specified in section 18-3-402(4)(a), or (4)(c)*" (emphasis added). Section 18-3-402(4)(a)-(c), in turn, provide:

> (a) The actor causes submission of the victim through the actual application of physical force or physical violence; or
> (b) The actor causes submission of the victim by threat of imminent death, serious bodily injury, extreme pain, or kidnapping, to be inflicted on anyone, and the victim believes that the actor has the present ability to execute these threats; or
> (c) The actor causes submission of the victim by threatening to retaliate in the future against the victim, or any other person, and the victim reasonably believes that the actor will execute this threat. As used in this paragraph (c), "to retaliate" includes threats of kidnapping, death, serious bodily injury, or extreme pain.

Thus, defendant argues that the language used in the interrogatories constituted plain error because: (1) the interrogatories failed to include the statutory language of section 18-3-402(4)(a)-(c), which is narrower than the common understanding of the terms "force," "intimidation," and "threat"; and (2) it used the term "cause" instead of "compel," as is contained in section 18-3-404(2)(b).

1. Force, Intimidation, and Threat

In defendant's view, the jury could have answered affirmatively to the "force, intimidation, or threat" question based on its common understanding of the terms without finding that defendant achieved the unlawful sexual contact by means of the conduct specified in section 18-3-402(4)(a)-(c).

However, whether the common definitions of the terms "force," "threat," and "intimidation" are broader than the language in section 18-3-402(4)(a)-(c) is not relevant here because the victim testified that defendant accomplished his unlawful sexual contacts by means of applying physical force (e.g., holding her arms down), which accords with the language of section 18-3-402(4)(a) ("The actor causes submission of the victim through the actual application of physical force or physical violence.").

Thus, although the victim also testified that she was "afraid to go outside" because of her illegal immigration status, and that she did not alert defendant's wife to the sexual contacts because she was "afraid" the wife would be angry, she did not testify that those fears or other threats made by defendant or his family were the means by which he accomplished the unlawful sexual contacts. Therefore, the evidence does not indicate that he accomplished his unlawful sexual contacts by threats or intimidation (either as commonly understood or as set forth in section 18-3-402(4)(b)-(c)), or by force other than physical force.

Consequently, any error in failing to include the language of section 18-3-402(4)(a)-(c) was not plain error. *See People v. Villareal*, 131 P.3d 1119, 1129 (Colo. App. 2005) (instructional error that could not have affected the jury verdict was harmless and was not a plain error). Likewise, the verdict forms' inclusion of intimidation and threats as alternative

theories of liability was not plain error. *See People v. Dunaway*, 88 P.3d 619, 631 (Colo. 2004).

2. Cause or Compel

Defendant further asserts that the trial court committed plain error by using the word "cause" in the interrogatories, rather than the word "compel." However, any such effort is not plain because the terms' commonly understood meanings are nearly identical. *Compare Webster's Third New International Dictionary 356* (2002) (defining "case" as (1) "to serve as a cause or occasion of : bring into existence : make," and (2) to effect by command, authority, or force"), *with id.* at 463 (providing nine definitions of "compel," seven of which involve the term "force").

Moreover, we reject defendant's argument that the legislative history of the crimes of first, second, and third degree sexual assault demonstrates that "case" and "compel" were intended to have different meanings. According to defendant, the words "cause" and "compel" were first used in 1975 when the General Assembly created first, second, and third degree sexual assault. First and second degree sexual assault required the actor to "cause" submission. Third degree sexual assault (the predecessor to the current unlawful sexual contact offense) required the actor to "subject" a victim to sexual contact and permitted enhancement if the actor "compel[led]" the victim to submit.

However, contrary to defendant's assertion, the legislative history demonstrates only that the General

Assembly intended "compel" to be more severe than "subject." It does not indicate that the General Assembly intended "compel" to be more severe than "cause."

E. Order of Prosecution Witnesses

Defendant contends that the trial court abused its discretion by permitting the prosecution to interrupt the victim's direct examination to present an expert witness who bolstered the victim's testimony. He claims that the interruption violated his Confrontation Clause right to cross-examine the victim effectively. We disagree.

A trial court has discretion to exercise reasonable control over the interrogation of witnesses and the presentation of evidence. CRE 611; *People v. Whitman*, ___P.3d ___, ____ (Colo. App. No. 04CA1428, Nov. 29, 2007). Absent an abuse of discretion, a trial court's rulings will not be disturbed on review. *People v. Caldwell*, 43 P.3d 663, 670 (Colo. App. 2001); *Whitman*, ___ P.3d at ___. Moreover, whether a defendant's rights under the Confrontation Clause have been violated is an issue of law we review de novo. *People v. Villano*, 181 P.3d 1225, 1229 (Colo. App. 2008).

Here, because the victim's testimony was taking much longer than anticipated due to the need for translation, the prosecution requested that five out-of-state witnesses (including an expert witness) be allowed to testify as scheduled the following day, the only day they were available.

Defendant objected to the expert witness testifying before the victim's cross-examination, but the trial court, noting its "discretion in terms of regulating the presentation of evidence under the rules of evidence," permitted the out-of-state witnesses to testify the following day as scheduled.

Although defendant argues that he was denied his right to meaningfully cross-examine the victim because her testimony was interrupted by a credibility-bolstering witness, any such bolstering (if there were any) would have occurred regardless of its timing. Moreover, defendant conceded that the prosecution could have called the expert to testify before the victim. These circumstances demonstrate that the timing of the expert's testimony was not prejudicial, especially considering that defendant was able to fully cross-examine both the expert and the victim on all aspects of their testimony. *Cf. People v. Cevallos-Acosta*, 140 P.3d 116, 127 (Colo. App. 2005) (a defendant's confrontation right is violated when he or she is prevented from cross-examining evidence bearing on credibility).

Thus, the interruption of the victim's testimony did not violate defendant's confrontation right to cross-examine her. *See Fensterer*, 474 U.S. at 20 ("[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.").

Moreover, the trial court's decision to permit the interruption in the victim's testimony based on the schedules of out-of-state witnesses, which is a reasonable and not arbitrary ground, was not an abuse of its discretion. *See Whitman*, ___ P.3d at ___.

The judgments of conviction are affirmed.

JUDGE TERRY and JUDGE MÁRQUEZ concur.

APPENDIX B

Supreme Court of Colorado,
En Banc.

Homaidan AL-TURKI, Petitioner,

v.

The PEOPLE of the State of Colorado, Respondent.

No. 09SC326.

Sept. 14, 2009.

Court of Appeals Case No. 06CA2104.
Petition for Writ of Certiorari DENIED.

JUSTICE MARTINEZ would grant as to the following issues:

Whether the court of appeals erred in this highly publicized prosecution of a Muslim defendant by requiring that a juror "unequivocally" express actual bias against the defendant as a precondition for permitting additional questioning of the juror or excusal for cause, where a juror clearly expressed a potential bias against the defendant based on the defendant's religion and the trial court refused to permit further questioning regarding the bias.

Whether, in deciding whether no reasonable possibility exists that a plainly erroneous special interrogatory contributed to the defendant's conviction

for multiple enhanced, lifetime prison sentences, the court of appeals applied a type of plain error review not in accord with the court's decisions by (i) limiting its review to the complaining witness's testimony and (ii) excluding from consideration substantial record evidence on which the jury impermissibly could have relied to make its enhancement finding.

Supreme Court, U.S.
FILED
MAR 5 - 2010
OFFICE OF THE CLERK

No. 09-700

IN THE SUPREME COURT OF THE UNITED STATES

Homaidan Al-Turki,

Petitioner,

vs.

State of Colorado,

Respondent.

On Petition for Writ of Certiorari
to the Colorado Court of Appeals

BRIEF IN OPPOSITION

JOHN W. SUTHERS
Attorney General

DANIEL D. DOMENICO
Solicitor General

MATTHEW S. HOLMAN, 16862*
First Assistant Attorney General
Appellate Division
Criminal Justice Section

MAJID YAZDI, 36043
Assistant Attorney General
Attorneys for Respondent
1525 Sherman Street, 7th Floor
Denver, Colorado 80203
(303) 866-5785
matt.holman@state.co.us
*Counsel of Record

TABLE OF CONTENTS

PAGE

STATEMENT OF THE CASE AND FACTS 1

ARGUMENT 7

This Court should deny certiorari review because the question presented in the petition was neither raised nor resolved below 7

CONCLUSION 15

TABLE OF AUTHORITIES

PAGE

CASES

Adams v. Robertson, 520 U.S. 83 (1997) 7, 12

Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001) 7

Aldridge v. United States, 283 U.S. 308 (1931) 14

Beck v. Washington, 369 U.S. 541 (1962) 8

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 12

Carrillo v. People, 974 P.2d 478 (Colo. 1999) 10, 11

City of Springfield Massachusetts v. Kibbe, 480 U.S. 257 (1987) 8

Glover v. United States, 531 U.S. 198 (2001) 8

Ham v. South Carolina, 409 U.S. 524 (1973) 9, 12, 13, 14

National Collegiate Athletics Assn. v. Smith, 525 U.S. 459 (1999) 8

Ristaino v. Ross, 424 U.S. 589 (1976) 9, 13

Rosales-Lopez v. United States, 451 U.S. 182 (1981) 9, 13

Turner v. Murray, 476 U.S. 28 (1986) 9

Webb v. Webb, 451 U.S. 493 (1981) 8

TABLE OF AUTHORITIES

PAGE

White River Lumber Co. v. State of Arkansas ex rel. Applegate, 279 U.S. 692 (1929) 8

Youakim v. Miller, 425 U.S. 231 (1976) 8

STATUTES

28 U.S.C. § 1257(a) 7

Colo. Rev. Stat. § 16-10-103(1)(j) 10

RULES

Sup. Ct. R. 10 15

Sup. Ct. R. 14.1(g)(i) 8

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI 12

U.S. Const. amend. XIV 12

STATEMENT OF THE CASE AND FACTS

In June 1999, Mr. Al-Turki and his wife/co-defendant brought Z.A., a 17-year old Muslim girl from a village in Indonesia, to Saudi Arabia to work for them as a domestic servant at a salary of 600 Saudi riyals (approximately $150) per month (Record 18:60-61, 71-75, 99-100, 102).

In September 2000, the Al-Turkis brought Z.A. to the U.S. (Record 18:124). She was admitted to stay until March 9, 2001, as a "personal or domestic employee." The Al-Turkis kept Z.A.'s passport but failed to renew it, while repeatedly warning her that if she left them she would be arrested (Record 21:28). They also strictly controlled her communications, disallowing her to write letters to her friends (Record 21:80; 22:49; 23:28, 132-134).

Mr. Al-Turki misrepresented Z.A.'s visa status and employment situation to his friends (Record 25:88-89, 262, 307). He also falsely told his secretary at his bookstore that Z.A. was married to a driver in Saudi Arabia (Record 25:184-85). Z.A. was instructed to say that her salary was $800 per month (Record 18:122). In August 2004, she was told that if she was contacted by authorities she should tell them that she had two days off every week, and that her salary was sent to Indonesia (Record 21:73-74, 99).

On November 18, 2004, following FBI investigations of Mr. Al-Turki, Z.A. was arrested for overstaying her permit. Mr. Al-Turki and his wife were also arrested for harboring an illegal alien. Initially, Z.A. told authorities what she had been instructed to say by the Al-Turkis regarding her employment situation. Eventually, however, she told the truth, including the fact that she had been

paid only $1500 during her entire stay in the United States.[1] She also revealed that Defendant had sexually abused her on a regular basis.

At trial, Z.A. provided a detailed account of Mr. Al-Turki's sexual misconduct. According to her, about once every two weeks, Mr. Al-Turki would go to her room in the basement at night and sexually molest her, including digitally penetrating her and forcing her to perform oral sex on him (Record 19:21-22, 26, 65, 97, 99, 102; 21:41). During the last incident of sexual abuse, which occurred approximately two weeks before Z.A.'s arrest, Mr. Al-Turki, for the first time, had sexual intercourse with Z.A., who was still a virgin (Record 21:44-46). Afterwards, Z.A. confronted Mr. Al-Turki with a blood-stained tissue, expressing fear that she would become pregnant (Record 21:45). Three days later, Mr. Al-Turki told Z.A. not to worry, that he would not have sexual intercourse with her again, and that she should tell him if she missed her period (Record 21:48). Z.A. kept a diary describing Mr. Al-Turki's sexual abuses. However, prior to Z.A.'s arrest, Mr. Al-Turki told her to destroy it, which she did (Record 21:75-76; 23:109-10).

Two married Muslim women described Mr. Al-Turki's similar acts of sexual misconduct against them, including touching their genitalia and breasts (Record 24:160-71, 180-99).

Mr. Al-Turki's theory of defense, which is repeated in his petition, was that Z.A., under pressure from the FBI and motivated by the desire

---

[1] Based on minimum wage, the value of Z.A.'s services during the last three years of her work for the Al-Turkis was $96,044.92 (Env. #6, People's Exh. 87a 5162).

to get authorization to stay and work in the U.S., had fabricated the allegations (Record 18:44, 50-51, 53-55; Env. #8, Instruction 32). However, Z.A., who disclosed Mr. Al-Turki's abusive conduct to a friend of his, Mr. Al-Resheid, more than a year before any contact with authorities (Record 19:105-06),[2] never asked for assistance to stay in the U.S. (Record 25:171). Moreover, under the 2000 Trafficking and Violence Protection Act, Z.A. automatically qualified for "continued presence" status, which allowed her to stay and work in the U.S. (Record 25:119-20, 122, 125-26), and the process to establish her "continued presence" status started long before she revealed the sexual abuse (Record 25:125). Finally, the FBI agent who helped Z.A. with filling out her necessary forms signed them on April 4, 2005, three days *before* her revelation (Record Env. #7, Deft's Exhs. E, F; 25:172-88).

Mr. Al-Turki was convicted of false imprisonment, conspiracy to commit false imprisonment, felony unlawful sexual contact (12 counts), criminal extortion, and theft (Record 4: 872-99). He was sentenced to concurrent terms of 20 years to life for the unlawful sexual contacts, an eight-year consecutive term for theft, and shorter terms on the remaining charges to run concurrently with the theft sentence (Record 4:901-02; 5:1250-55; 29:73-76; Supp. Record 31-34).

On appeal, Mr. Al-Turki challenged his convictions on various grounds. In an unpublished opinion, the Colorado Court of Appeals affirmed Mr. Al-Turki's convictions. *People v. Al-Turki*, 06CA2104,

---

[2] Mr. Al-Resheid, a subpoenaed witness for the prosecution, left the U.S. on August 16, 2005, and never returned (Record 20:52-54).

January 22, 2009 (Petition, App. 1a-29a). The Colorado Supreme Court denied certiorari review. *Al-Turki v. People*, 2009 WL 2916999 (Colo. No. 09SC326, September 14, 2009) (Petition App. 30a-31a).

Jury Selection Issues Raised on Appeal

In his direct appeal, petitioner raised two claims concerning jury selection, alleging that the trial court erred by (1) denying his challenges for cause to three prospective jurors, including Juror C.M., and (2) imposing an "unreasonable time limit" on *voir dire*. Deft's. C.A. Br. 20-43.

The Colorado Court of Appeals relied on the following account of the jury selection process and Juror C.M.'s relevant statements and demeanor:

> Here, before the parties' voir dire, the court required the prospective jurors to complete two questionnaires that asked the jurors' feelings on issues specifically relating to the case. For example, one question provided: "The defendant, the complaining witness, and the other witnesses in this case are Muslims from the Middle East and Indonesia. Please briefly give your reaction to that fact." Another question asked: "Do you believe there is any reason why you cannot be a fair and impartial juror? If yes, please give your reasons."

Petition 20a. Juror C.M. wrote "[n]one" in response to the question regarding potential ethnic or

religious biases (Record White Env. #7, Questionnaire #71).

"Juror C.M. was scheduled to go on a business trip to Mexico the following week, which could not be rearranged without some inconvenience and possible expense." Petition 12a. After C.M. was selected as a juror, defense counsel noted that he "'appear[ed] somewhat agitated' and asked the court to excuse him for cause because of hardship related to his upcoming business trip.[3] The prosecution objected, and the court denied defendant's request." *Id.* at 13a. "As the court began administering the oath to the jury, Juror C.M. interrupted," asking:

> ... if I'm more likely to believe a person of faith would commit a crime if it conflicted – *if the faith conflicted with the laws of our government.* It being said that the Muslim religion will be at issue here, it is my understanding that the laws of God are higher than the laws of man. Would it be a bias that I have or would that be consistent with the Muslim religion?" [sic]

Id. (Emphasis added; brackets in original). Following additional exchanges between Juror C.M. and the court, the court stated that "while it could not get into specific facts or issues that might come up in the case, based on Juror C.M.'s previous

---

[3] Defense counsel described Juror C.M.'s reaction to his selection as follows: "[H]e looked as if he just woken up and realized what his plight was, and his plight was he was going to be serving on this jury." (Record 26:12).

indication that he could follow the law and base his decision on the evidence presented, he was qualified as a juror in this case. Juror C.M. then said, 'okay.'" *Id.* at 14a.[4]

Based on this record, the Colorado Court of Appeals made two factual findings in support of its decision to uphold the trial court's order denying petitioner's challenge for cause to Juror C.M.:

> ... First, prior to his selection, Juror C.M. did not evince any concerns of bias toward defendant or the Islamic religion. His questionnaire indicated that he had no reaction to the fact that people involved in the case were Muslim. Moreover, defendant expressed no concerns when the issue was raised of whether people from other cultures living in the U.S. should obey the laws of this county.
>
> Second, after his selection, Juror C.M.'s comments did not unequivocally express actual bias against defendant or his religion. ... Juror C.M. was simply asking for clarification, and was not evincing a bias against defendant or

---

[4] Juror C.M.'s purely hypothetical question to the court concerning possible conflicts between Islamic laws or beliefs and state laws was not pertinent to this case, which did not present any such conflicts, particularly regarding the alleged behavior underlying sexual assault and theft, the two most serious charges brought against petitioner.

his religion that would require rehabilitation.

Id. at 15a-16a.

ARGUMENT

This Court should deny certiorari review because the question presented in the petition was neither raised nor resolved below.

Petitioner has invoked this Court's jurisdiction under 28 U.S.C. § 1257(a). Petition 1. In reviewing state court judgments under this statute, "[w]ith 'very rare exceptions,'" this Court has adhered to the rule that it "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision" to be reviewed. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*) (dismissing the writ as improvidently granted because state supreme court did not expressly address the question on which certiorari was granted); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (*per curiam*) (same; "Mindful that this is a court of final review and not first review ... we thus decline to reach the merits of petitioner's present challenge").

This Court has also recognized that "adhering scrupulously to the customary limitations on [its] discretion regardless of the significance of the underlying issue, ... promote[s] respect ... for the Court's adjudicatory process." *Adarand Constructors, Inc.*, *supra*, at 110 (quoting *Adams*, *supra*, at 92 n. 6). *See Beck v. Washington*, 369 U.S. 541, 549-50

(1962) (petitioner's equal protection claim was not properly before this Court, as it was never properly presented to state courts); *White River Lumber Co. v. State of Arkansas ex rel. Applegate*, 279 U.S. 692, 700 (1929) (same). *See also National Collegiate Athletics Assn. v. Smith*, 525 U.S. 459, 470 (1999) (ordinarily the Court does "not decide in the first instance issues not decided below"); *Glover v. United States*, 531 U.S. 198, 205 (2001) (same); *City of Springfield Massachusetts v. Kibbe*, 480 U.S. 257 (1987) (*per curiam*) (same); *Youakim v. Miller*, 425 U.S. 231 (1976) (*per curiam*) (same). "'[I]t would be unseemly in our dual system of government,' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams*, *supra*, at 90 (quoting *Webb v. Webb*, 451 U.S. 493 (1981)).

Thus, under this Court's Rule 14.1(g)(i), a petitioner seeking review of a state-court judgment must specify when the federal questions sought to be reviewed were raised in state courts and "the method or manner of raising them and the way in which they were passed on by those courts; ... so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari."

The question presented by petitioner is "whether the courts below erred in refusing to allow petitioner to probe the juror for potential bias (or to dismiss the juror for cause) on the ground that the juror's comments 'did not unequivocally express actual bias.'" Petition, Question Presented. This compound question raises two completely separate issues: (1) the trial court's refusal to allow petitioner to probe a particular juror (Juror C.M.) for bias; and (2) the trial court's refusal to dismiss the same juror

for cause. Under "Reasons for Granting the Writ," however, petitioner discusses only the first issue, without arguing, or even claiming, that the Colorado Court of Appeals erred in upholding the trial court's refusal to excuse Juror C.M. for cause. The first issue, on the other hand, is not properly before this Court because it was neither raised nor resolved in petitioner's appeal.

Relying on *Ham v. South Carolina*, 409 U.S. 524 (1973), *Ristaino v. Ross*, 424 U.S. 589 (1976), *Rosales-Lopez v. United States*, 451 U.S. 182 (1981), and *Turner v. Murray*, 476 U.S. 28 (1986), petitioner asserts that "[t]his Court repeatedly has made clear that a trial court must allow a defendant in a criminal case to probe prospective jurors for bias whenever there is a 'significant likelihood' that racial or similarly invidious prejudice might infect the juror's [sic] deliberations." Petition 10. He further asserts that in his case the trial court rejected his request to question Juror C.M., who allegedly stated that he was biased against Muslims, and that the Colorado Court of Appeals affirmed that decision by "holding that the juror's comments 'did not unequivocally express actual bias.'" *Id.* "This decision," claims petitioner, "which follows others in Colorado, so clearly and consequentially departs from the Constitution's 'significant likelihood' standard as to require this Court's intervention." *Id.*

However, petitioner's account of the Colorado Court of Appeals' holding is incorrect. In the summary of its conclusions, the court stated its holding on the two issues raised by petitioner regarding *voir dire*:

> B. The trial court did not err in denying three of defendant's challenges for cause because the three prospective jurors did not evince actual bias toward defendant.
>
> C. The trial court did not abuse its discretion in restricting the parties' voir dire of prospective jurors to forty-five minutes per party because the court conducted its own voir dire and had the jurors complete two questionnaires before imposing the time restriction.

Petition App. 2a. Under the heading of "Challenges for Cause," the court stated the question raised by petitioner as follows: "Defendant contends that the trial court erred in denying the challenges for cause he asserted based on alleged actual bias of three jurors." *Id.* at 11a. As to Juror C.M., applying the Colorado statute governing challenges for cause, Colo. Rev. Stat. § 16-10-103(1)(j), the court upheld the trial court's refusal to excuse him for cause based on its findings that (1) "prior to his selection, Juror C.M. did not evince any concerns of bias toward defendant or the Islamic religion," and (2) Juror C.M.'s comments after his selection "did not unequivocally express actual bias against defendant or his religion. *See Carrillo*, 974 P.2d at 488." *Id.* at 11a, 15a-16a. In *Carrillo v. People*, 974 P.2d 478, 488 (Colo. 1999), cited by the court, the Colorado Supreme Court held that the prospective juror's "answers to questions about his working relationship with [the victim's father who was a prosecution witness] appear ambiguous and fail to articulate a clear expression of bias *requiring his dismissal*" (emphasis added).

Thus, contrary to petitioner's repeated assertions, Petition 8-9, 13-18, the requirement of an "unequivocal expression of actual bias" stated by the Colorado Court of Appeals in petitioner's case, and the requirement of "a clear expression of bias" stated by the Colorado Supreme Court in *Carrillo*, apply to *dismissal* of a juror for cause and have nothing to do with the issue of *probing* of a juror for bias.

The only reference to the issue of additional questioning of Juror C.M. in the Colorado Court of Appeals' opinion is found in the statement that "the trial court did not abuse its discretion in denying defendant's challenge for cause and his request for extended voir dire." Petition, App. 16a. "Extended voir dire" in this context, however, refers to the court's conclusion, stated immediately before this statement, that the trial court was not required to rehabilitate Juror C.M. before denying petitioner's request to excuse him for cause: "Thus, Juror C.M. was simply asking for clarification, and was not evincing a bias against defendant or his religion that would require rehabilitation." *Id.*

In his petition for certiorari review to the Colorado Supreme Court, petitioner argued that his case raised two issues that needed to be addressed: (1) "when an expression of potential bias by a prospective juror triggers a trial court's duty to inquire further or, at the very least, permit additional questioning upon request regarding the potential bias and the juror's ability to be fair and impartial"; and (2) "this Court should clarify the appropriate standard for determining when a prospective juror's expression of actual bias warrants excusal for cause." Petition for Writ of Certiorari 7-8. Petitioner did not cite a single federal case in support of this argument, relying

instead only on Colorado cases, statutes, and rules, and one case from Utah. *Id.* at 8-19.

As the above account shows, the issue raised and addressed in petitioner's appeal was whether the trial court erred in denying petitioner's challenge for cause to Juror C.M. Whether petitioner was constitutionally entitled under *Ham* to further probe Juror C.M. for religious bias was neither raised by him nor decided by the Colorado Court of Appeals. Not a single case dealing with that issue is even cited in the opinion.

Citing isolated statements from the opening brief in his direct appeal, petitioner nevertheless asserts that he "clearly and unambiguously argued on appeal, citing *Ham*, that the trial court's refusal to allow such questioning 'denied [him] his rights to a fair trial by an impartial jury and due process under the Sixth and Fourteenth Amendments to the U.S. Constitution.'" Petition 14 (quoting Deft's C.A. Br. 20). However, the single citation to *Ham* in petitioner's opening brief, with no discussion, was in connection with his claim of alleged "unreasonable time limit" placed on *voir dire* in general. As this Court has observed, "[t]he discussion of 'a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim.'" *Adams v. Robertson*, 520 U.S. at 88 (quoting *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 n. 9 (1987)).

Petitioner also claims that he made the following argument to the Colorado Court of Appeals: "'The trial court's' restrictions on *voir dire* 'violat[ed] Mr. Al-Turki's rights to due process and a fair trial by an impartial jury.'" Petition 14 (quoting Deft's C.A. Br. 40). However, the word "restrictions"

in this statement is a substitute for the phrase "unreasonable time limitation" in the original sentence appearing in petitioner's opening brief on which the above quotation is based. Moreover, the original statement appeared in the section of the opening brief discussing the trial court's alleged "unreasonable time limit" on *voir dire* in general. Deft's C.A. Br. 40.

Ham, *Ristaino*, *Rosales-Lopez*, and *Turner* stand for the proposition that the trial court unconstitutionally abuses its discretion by refusing to do *any* probing of racial and ethnic biases of jurors where "special circumstances" create a "particularly compelling need" for such an inquiry, such as when racial or ethnic biases are "inextricably bound up with the conduct of the trial." Assuming this principle is even relevant to the issue presented here – i.e., allegation of religious (anti-Muslim), rather than racial or ethnic, bias of a particular juror in a case where the defendant, the victim, and the key witnesses all belong to the same faith (Islam) – it is still inapplicable to petitioner's case because the trial court here *did* allow probing of jurors' biases by including in a case-specific juror questionnaire two questions submitted by petitioner specifically addressing ethnic and religious biases. As to the *adequacy* of the trial court's inquiry, as this Court has observed:

> ... the trial judge [is] not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner. The Court in *Aldridge* was at pains to point out, in a context where

> its authority within the federal system of courts allows a good deal closer supervision than does the Fourteenth Amendment, that the trial court 'had a broad discretion as to the questions to be asked.'

Ham, supra, at 527 (quoting *Aldridge v. United States*, 283 U.S. 308, 310 (1931)).

Petitioner urges this Court's intervention on the ground that "Colorado's substitution of an 'unequivocal express[ion] of actual bias' standard for the Constitution's 'significant likelihood' causes real harm," and that "the integrity of the federal Constitution and this Court's decisions is at stake." Petition, 16-17 (brackets in original). Both claims are unfounded, as they are based on the false premise that Colorado courts have abandoned a constitutional standard.[5]

---

[5] The entire argument presented in the *amicus* brief filed by the National Association of Criminal Defense Lawyers and the Colorado Criminal Defense Bar is based on the same false premise that "Colorado state courts, in contravention of this Court's prior pronouncements in *Ham* ... *Ristaino* ... and subsequent cases, have held that there is no entitlement to probe a prospective juror for prejudice – even invidious prejudice – absent a 'clear' or 'unequivocal' expression of bias on the part of the juror." Motion for Leave to File *Amici Curiae* Brief and Brief of the National Association of Criminal Defense Lawyers and the Colorado Criminal Defense Bar As *Amicus Curiae* in Support of Petition for A Writ of Certiorari 2. The *amicus* brief filed on behalf of the Kingdom of Saudi Arabia makes the vague assertion that the Colorado Court of Appeals constitutionally erred "by ruling that a juror's revelation of bias must be unequivocal throughout *voir dire*." Motion for Leave to File Brief of the Kingdom of Saudi Arabia as *Amicus Curiae* in Support of Petitioner 3.

CONCLUSION

The question presented by petitioner was neither raised nor resolved below. Nor does the Colorado Court of Appeals' opinion disregard any constitutional standard established by this Court regarding probing of jurors for racial or ethnic bias. There is simply no "compelling reason" for granting certiorari review in this case. Sup. Ct. R. 10.

Respectfully Submitted,

JOHN W. SUTHERS
Attorney General

DANIEL D. DOMENICO
Solicitor General

MATTHEW S. HOLMAN, 17846*
First Assistant Attorney General
Appellate Division
Criminal Justice Section

MAJID YAZDI, 36043
Assistant Attorney General
Attorneys for Respondent

1525 Sherman Street, 7th Floor
Denver, Colorado 80203
Telephone: (303) 866-5785
Fax: (303) 866-3955
matt.holman@state.co.us
*Counsel of Record

Supreme Court, U.S.
FILED
MAR 17 2010
OFFICE OF THE CLERK

No. 09-700

IN THE
Supreme Court of the United States

HOMAIDAN AL-TURKI,
Petitioner,

v.

COLORADO,
Respondent.

On Petition for Writ of Certiorari
to the Colorado Court of Appeals

REPLY BRIEF FOR PETITIONER

Harold A. Haddon
Ty Gee
Jason Middleton
HADDON, MORGAN AND
FOREMAN P.C.
150 East 10th Avenue
Denver, CO 80203

Jeffrey L. Fisher
Counsel of Record
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@law.stanford.edu

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

REPLY BRIEF FOR PETITIONER 1

A. The Decision Below is Incorrect 1

B. The Question Presented Is Properly Before This Court 2

CONCLUSION 7

APPENDIX, Excerpted Portions of Petitioner's Brief in the Colorado Court of Appeals 1a

TABLE OF AUTHORITIES

CASES

Adams v. Robertson, 520 U.S. 83 (1997) (per curiam) 5, 7

Baldwin v. Reese, 541 U.S. 27 (2004) 3

Ham v. South Carolina, 409 U.S. 524 (1973) ..... passim

Howell v. Mississippi, 543 U.S. 440 (2005) 3, 5

Lee v. Illinois, 476 U.S. 530 (1986) 4

Lilly v. Virginia, 527 U.S. 116 (1999) 3, 4

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) 7

Ristaino v. Ross, 424 U.S. 589 (1976) 1, 2

Rosalez-Lopez v. United States, 451 U.S. 182 (1981) 1, 2

Taylor v. Illinois, 484 U.S. 400 (1988) 4

Turner v. Murray, 476 U.S. 28 (1986) 1, 2

Webb v. Webb, 394 U.S. 493 (1981) 7

Williamson v. United States, 512 U.S. 594 (1995) 4

CONSTITUTIONAL AUTHORITIES

U.S. Const., amend. V 4

U.S. Const., amend. VI 4, 5

U.S. Const., amend. XIV 4, 5

OTHER AUTHORITY

Gressman, Eugene, et al., Supreme Court Practice (9th ed. 2007) 7

REPLY BRIEF FOR PETITIONER

The State's brief in opposition leaves little doubt that the trial court violated petitioner's federal constitutional right to probe potential jurors for possible ethnic bias. The State thus attempts to fend off this Court's intervention by arguing that petitioner did not adequately raise this federal claim in the Colorado courts. That argument is unfounded. This Court should grant certiorari and reverse.

A. The Decision Below Is Incorrect.

In its cursory defense of the decision below, the State argues that the trial court satisfied the rule of *Ham v. South Carolina*, 409 U.S. 524 (1973), and its progeny because it "*did* allow probing of jurors' biases," instead of "refusing to do *any* probing of racial or ethnic biases of jurors." BIO 13. This argument, however, misconceives this Court's precedent.

The rule that *Ham* established is that a defendant is entitled to probe for bias insofar as, "*under all of the circumstances presented*[,] there [i]s a constitutionally significant likelihood" that racial or ethnic would bias infect the jury box. *Ristaino v. Ross*, 424 U.S. 589, 596 (1976); *accord accord Turner v. Murray*, 476 U.S. 28, 33 (1986) (plurality opinion); *Rosalez-Lopez v. United States*, 451 U.S. 182, 189 (1981). This totality-of-the-circumstances test obviously includes any previous questions the trial court has asked and answers potential jurors have given. Accordingly, if, after a standard questionnaire or initial inquiries, there remains a "significant likelihood" that a potential juror is biased, *Ham*

entitles the defendant to demand additional questioning. *See* Pet. 11-13. Any other rule would turn *Ham* on its head; it would mean that a trial court could discharge its duty to protect the accused's right to an impartial jury by asking a few questions that revealed an actual probability of bias, and then doing nothing about it.

The only real issue on the merits, therefore, is whether the Colorado courts applied the correct legal standard in shutting off petitioner's ability to question Juror C.M. concerning his apparent predisposition against Muslims. This Court's precedent makes clear that the courts should have asked whether there was a "significant likelihood" that Juror C.M. was biased. *Ristaino*, 424 U.S. at 596; *accord Turner*, 476 U.S. at 33 (plurality opinion); *Rosalez-Lopez*, 451 U.S. at 189. The decision below, however, held that the trial court properly denied petitioner's "request for extended *voir dire*" because "Juror C.M.'s comments did not *unequivocally express* actual bias." Pet. App. 16a (emphasis added). The State does not even try to argue that this "no unequivocal expression" reasoning is consistent with federal law. Nor could it. The decision cannot stand.

B. The Question Presented Is Properly Before This Court.

Faced with a decision below that squarely conflicts with this Court's precedent, the State resorts to arguing that the question presented is not properly before this Court. Not so.

1. The State argues primarily that petitioner did not adequately raise his *Ham* claim in the Colorado appellate courts. BIO 11-13. But this Court's cases make clear that the State is mistaken.

A party adequately raises a federal claim in state court if he articulates the claim and cites "the federal source of law on which [he] relies *or* a case deciding such a claim based on federal grounds." *Howell v. Mississippi*, 543 U.S. 440, 444 (2005) (quoting *Baldwin v. Reese*, 541 U.S. 27, 32 (2004)) (emphasis added); *accord Lilly v. Virginia*, 527 U.S. 116, 123 (1999). Petitioner articulated his federal claim in the Colorado Court of Appeals and provided *both* of these kinds of citations to support it. He began the argument section of his brief this way:

> The trial court's refusal to excuse jurors for cause *and its strict time limitations on jury selection* denied Mr. Al-Turki his *rights to a fair trial by an impartial jury and due process under the Sixth and Fourteenth Amendments to the U.S. Constitution* and article II, sections 16 and 25, of the Colorado Constitution.

Deft's C.A. Br. 20 (emphasis added).[1] Later on, he specifically cited *Ham* and provided a parenthetical explaining that the case held that "due process requires that defendant be permitted to question prospective jurors about potential race bias in cases where facts raise racial issues." *Id.* at 40. And at oral argument, he reiterated that "the Due Process

---

[1] The pertinent portions of petitioner's brief in the Colorado Court of Appeals are reproduced in the Appendix to this brief.

Clause in a clear line of cases" from "the United States Supreme Court" required extra questioning of Juror C.M. Tr. of Oral Arg. 6. Likewise, in his petition for review to the Colorado Supreme Court, petitioner argued that "[t]he trial court's refusal to permit further questioning or, alternatively, to excuse [Juror C.M.] for cause violated Mr. Al-Turki's constitutional rights to due process and to a fair and impartial jury. U.S. Const. amends. V, VI, XIV." Deft's Pet'n for Cert. 6.

To be sure, most of petitioner's argument in the Colorado courts dealt with state law and state cases. But that is as it should be in our federal system; where reasonably possible, parties should ask for relief, first and foremost, under state law and precedent. In *Lilly*, for instance, the defendant "focused" in state court "on state hearsay law" in challenging the admission of a co-defendant's statements. 527 U.S. at 123. But this Court held that he properly preserved a federal Confrontation Clause claim for review because he "expressly argued in his opening brief to [the state] court that the admission of the statements violated his Sixth Amendment right to confrontation" and cited one of this Court's confrontation decisions in his reply brief. *Id.*[2]; *see also Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988) (finding a federal claim properly preserved under similar circumstances). Petitioner's brief to

---

[2] The defendant in *Lilly* cited two of this Court's decisions to the Virginia Supreme Court: *Lee v. Illinois*, 476 U.S. 530 (1986), and *Williamson v. United States*, 512 U.S. 594 (1995). *See Lilly*, 527 U.S. at 123. But only *Lee* involves the Confrontation Clause. *Williamson* involves the Federal Rules of Evidence, which are inapplicable in state court.

the Colorado Court of Appeals did the same thing, with the insignificant difference that he cited this Court's precedent in his opening brief. And in the Colorado Supreme Court, petitioner reprised the federal aspect of his claim by expressly "cit[ing]" the Sixth and Fourteenth Amendments to "the Constitution," *Howell*, 543 U.S. at 443, in support of his claim that "[t]he trial court's refusal to permit further questioning" of Juror C.M. "violated Mr. Al-Turki's constitutional rights to due process and to a fair and impartial jury." Deft's Pet'n for Cert. 6.

The State protests that petitioner's reference in the Colorado Court of Appeals to *Ham* was inadequate because it appeared in the midst of an argument that the trial court unreasonably limited *voir dire* "in general," BIO 12, and "'[t]he discussion of a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim,'" *id.* (quoting *Adams*, 520 U.S. at 88). But petitioner's attack on the trial court's general limitation on *voir dire* was hardly "unrelated," *id.*, to the trial court's failure to question Juror C.M. about his apparent bias. To the contrary, the two errors were one and the same. The very reason the trial court declined to probe Juror C.M. was because it had ordered *ex ante* that *voir dire* would last only forty-five minutes. *See* Pet. 4-5. In other words, the trial court's refusal to budge from its general limitation on *voir dire*, even after Juror C.M. expressed his predisposition against Muslims and petitioner specifically requested additional questioning, is exactly what caused the violation of petitioner's federal constitutional rights.

The relevant section of petitioner's brief, in fact, explicitly drew this connection. It first explained that "[o]ne juror (C.M. (#71)) made repeated attempts to disclose his anti-Muslim bias against Mr. Al-Turki. The juror said Mr. Al-Turki's religion made him more likely to have broken the law. This juror expressed reluctance to take the juror oath and did so only after being forced to by the trial court." Deft's C.A. Br. 38. After discussing other jurors' circumstances, petitioner then argued that "[t]he trial court rigidly adhered to an arbitrary forty-five minute time limitation that was unreasonable given . . . the obvious issues that merited exploration, including: . . . potential prejudices against Muslims, Middle Easterners, or immigrants." *Id.* at 39. On the very next page, petitioner made his position plain: "The trial court's unreasonable time limitation precluded counsel from questioning many prospective jurors about entire topics altogether, violating Mr. Al-Turki's rights to due process and a fair trial by an impartial jury." *Id.* at 40. He then cited *Ham,* as noted above, for the proposition that "due process requires that defendant be permitted to question prospective jurors about potential race bias in cases where facts raise racial issues." *Id.* There can be no doubt that this discussion and citation fairly advised the Colorado Court of Appeals of the *Ham*-based claim petitioner makes here.

2. To the extent that the State separately suggests that the question presented is not properly before this Court because the Colorado Court of Appeals did not "decide[]" the question presented or "cite a single case dealing with that issue . . . in the opinion," BIO 12, the State is equally mistaken. It is

well established that a federal claim is properly before this Court whenever "it was either addressed by, *or properly presented to*, the state court that rendered the decision" at issue. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam) (emphasis added). Thus, so long as the party invoking this Court's jurisdiction gave the state court "a fair opportunity to address the federal question that is sought to be presented here," *Webb v. Webb*, 394 U.S. 493, 501 (1981), it is immaterial whether the state court "direct[ly]" rejected federal claim. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). When, as here, "the necessary effect of the judgment has been to deny the claim, that is enough." *Id.*; *see generally* Eugene Gressman et al., Supreme Court Practice § 3.18, at 187 (9th ed. 2007).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Harold A. Haddon
Ty Gee
Jason Middleton
HADDON, MORGAN AND FOREMAN P.C.
150 East 10th Avenue
Denver, CO 80203

Jeffrey L. Fisher
Counsel of Record
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@law.stanford.edu

March 17, 2010

APPENDIX

APPENDIX

COURT OF APPEALS, STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203

Appeal from the District Court in and for the Eighteenth Judicial District, Arapahoe County, Colorado
Honorable Mark J. Hannen, Case No. 05CR432

Appellees-Plaintiffs:
PEOPLE OF THE STATE OF COLORADO

COURT USE ONLY

Appellant-Defendant:
HOMAIDAN AL-TURKI

Case No. 06CA2104

Harold A. Haddon, #1596
Ty Gee, #19772
Gail K. Johnson, #29703
HADDON, MORGAN, MUELLER, JORDAN, MACKEY & FOREMAN, P.C.
150 East 10th Avenue
Denver, CO 80203
Tel.: (303) 831-7364
Fax: (303) 832-2628
hhaddon@hmflaw.com;
tgee@hmflaw.com;
gjohnson@hmflaw.com

Marci A. Gilligan, #32160
Richilango & Gilligan, P.C.
633 17th Street, Suite 1700
Denver, CO 80202
(303) 893-8000

Daniel N. Recht, #11569
Recht & Kornfeld, P.C.
1600 Stout Street, Suite 1000
Denver, CO 80202
(303) 575-1900

Robert T. Fishman, #21842
P.O. Box 201028
Denver, CO 80220
(303) 377-6338

Attorneys for Appellant-Defendant Homaidan Al-Turki

Opening Brief

* * *

[20]

Argument

I. Because the trial court erroneously denied challenges for cause and unreasonably restricted jury *voire dire*, a new trial is required.

The trial court's refusal to excuse jurors for cause and its strict time limitations on jury selection denied Mr. Al-Turki his rights to a fair trial by an impartial jury and due process under the Sixth and Fourteenth Amendments to the U.S. Constitution and article II, sections 16 and 25, of the Colorado Constitution. *See People v. Rhodus*, 870 P.2d 470, 73 (Colo. 1994) ("Due process requires a fair trial in a fair tribunal"). The trial court's erroneous denials of challenges for cause due to bias also infringed C.R.S. § 16-10-103(1)(j) and Crim. P. 24(b)(1)(X).

The potential for juror bias was glaringly obvious from the circumstances of this highly publicized case. The prosecution and defense jointly proposed a *voir* [21] *dire* process that would have afforded them an adequate opportunity to question jurors about their personal attitudes.[106]

The trial court rejected the joint stipulation and instead conducted a general *voir dire* of all 106 people simultaneously, asking generally whether the venire

---

[106] Supp. Record 0043-0046.

members could be "fair and impartial."[107] The overwhelming majority of the venire members said nothing in response to these kinds of general questions posed to the entire panel.[108] The parties were then given forty-five minutes apiece to question the entire panel of 106 people. Despite statements in jury questionnaires and in general *voir dire* that suggested potential bias, individual questioning was so limited as to be perfunctory or nonexistent. *Cf. Morgan v. Illinois*, 504 U.S. 719, 734-35 (1992) (holding that "general fairness and 'follow the law' questions" are insufficient to ferret out jurors who would automatically impose the death penalty for conviction of a capital offense.). No *in camera* questioning at all was conducted in this sexual assault case.

The trial court cited generic silence in response to its *voir dire* of the entire panel as justification for refusing to excuse for cause a juror who in open [22] court expressed bias against Mr. Al-Turki because he is a Muslim. Since all preemptory challenges had been exhausted, this juror actually served on the jury. Citing silence, the court refused to excuse two female prospective jurors who themselves had been sexually assaulted, causing the defense to exercise two peremptory challenges. The court's rulings resulted in a biased jury and a fundamentally unfair trial.

A. The trial court erroneously denied three defense challenges for cause.

---

[107] R2634:1-9(Apx.33).

[108] R2629:9(Apx.28)—R2634:21(Apx.33).

* * *

[35]

B. The trial court's rigid adherence to an unreasonable time limit denied Mr. Al-Turki the ability to intelligently exercise his challenges for cause and peremptory challenges.

Standard of Review. A trial court's limit limitations on *voir dire* are reviewed for an abuse of discretion. *People v. Rudnick*, 878 P.2d 16, 21 (Colo. App. 1993).

Discussion. *Voir dire* plays a "critical function" in assuring an impartial jury. *Morgan*, 504 U.S. at 72. "Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Id.* at 729-30.

This was a highly publicized case that not only involved numerous charges of sexual assault but also raised issues concerning the Muslim religion and Middle Eastern culture. It was precisely the type of case that demanded careful [36] jury selection procedures. However, the hurried process by which Mr. Al-Turki's jury was selected was fatally flawed, from start to finish.

Disregarding a stipulation of the parties concerning the *voir dire* procedures,[141] the trial court required the attorneys to question a panel of 106 potential jurors with only forty-five minutes per side.[142] Thus, ***Mr. Al-Turki's attorney had, on average, only twenty-five seconds in which to question each potential juror*** (or approximately eight or nine lines of record transcript). In a trial of such serious charges – first degree kidnapping (requiring a life sentence upon conviction) – such a restriction is unreasonable as a matter of law.

At least a dozen prospective jurors indicated on their questionnaires that they were unable to openly discuss their experience of having been or knowing a sexual assault victim.[143] Nonetheless, the court did not conduct any *in camera* questioning of any potential jurors.

[37] Defense counsel repeatedly complained about the lack of time under the trial court's procedures and asked for more time to conduct additional *voir dire*.[144] When asked to pass the panel for cause, defense counsel declined to do so, asserting that there had not been adequate opportunity to question prospective jurors who had self-identified as sexual assault

---

[141] Supp. Record 0043-0046.

[142] R2635:11-12.

[143] D.J. (#10), R533s; D.T. (#18), R5348; G.W. (#31), R5370; S.S. (#43), R5392; T.C. (#46), R5398; J.M. (#51), R5616; T.S. (#65), R5644); C.M. (#71), R5656; D.C. (374), R5662; C.T. (#79), R5672; C.G. (#87), R5688; B.C. (#99), R5712.

[144] R2720:2-10; R2725:24-R2726:9.

victims.[145] Defense counsel again requested additional time to question the jurors.[146] The trial court refused, ruling that it had "ample information concerning the prospective jurors based on their answers to the questionnaires" and the court's own questioning of the jurors regarding their ability to be fair and impartial.[147]

The trial court also denied several defense challenges for cause and denied defense counsel additional time to further develop those challenges. (*See* Arg. I.A., *supra*.)

Among the twelve jurors who convicted Mr. Al-Turki in this case, eight of them – a full two-thirds of the jury – either did not speak at all during* voir dire *(five), spoke only concerning hardship issues (two), or spoke only to express* [38] *bias just before being sworn, when the trial court allowed no further questioning by counsel (one).[148]

The twelve jurors who convicted Mr. Al-Turki included the following:

- One juror (C.M. (#71) made repeated attempts to disclose his anti-Muslim bias against Mr. Al-Turki. The juror said Mr. Al-Turki's religion made him more likely to have broken the law.

---

[145] R2731:20-R2732:22.
[146] R2732:23.
[147] R2732:24-R2733:11.
[148] R4455:6-R4456:5.

This juror expressed reluctance to take the juror oath and did so only after being forced to by the trial court.[149]

- Four jurors had a relative, friend or acquaintance who had been sexually assaulted.[150] Of these, one expressly indicated he could not discuss this matter in open court.[151]
- Three jurors recalled pretrial publicity about the case.[152] Of these, one lived only blocks from the Al-Turki home.[153]
- One juror said that upon learning that the defendant and various witnesses were Muslims from the Middle East and Indonesia, her reaction was "frightened."[154]

In Colorado, a trial judge is authorized to "limit or terminate repetitious, irrelevant, unreasonably lengthy, abusive, or otherwise improper examination" [39] during *voir dire*. Crim.P. 24(a)(3). That is not what the trial court did here. The trial court rigidly adhered to an arbitrary forty-five minute time limitation that was unreasonable given the enormous size of the panel (106 prospective jurors), the seriousness of this case, and the obvious issues that merited exploration, including: exposure to pretrial publicity; attitudes about and victimization by sexual assault; potential prejudices against Muslims, Middle

---

[149] R2751:23-R2760:13 (Apx. 35-44).

[150] L.P. (#52), R5618; E.H. (#57), R5628; D.P. (#66), R5646; C.M. (#71), R5656.

[151] C.M. (#71), R5656.

[152] J.T. (#45), R5396; L.P. (#52), R5618; D.I. (#56), R5625.

[153] L.P. (#52), R5618.

[154] J.C. (#4), R5320.

Easterners, or immigrants; and application of the law regarding the defendant not testifying.[155]

Colorado law provides that a trial court may reasonably limit the time available for *voir dire* "[s]o long as the *voir dire* examination is conducted in a manner that will facilitate an intelligent exercise of challenges for cause and peremptory challenges." *Rudnick*, 878 P.2d at 21. The *voir dire* procedures here [40] were unreasonable because they did not allow for an intelligent exercise of challenges for cause and peremptory challenges.

The trial court's unreasonable time limitation precluded counsel from questioning many prospective jurors about entire topics altogether, violating Mr. Al-Turki's rights to due process and a fair trial by an

---

[155] One example of how the unreasonable time limitation impacted Mr. Al-Turki's ability to select a fair and impartial jury occurred with respect to prospective juror M.R. (#22). M.R. was a pizza delivery man who stated on his questionnaire, in response to being informed that the defendant, the complaining witness, and other witnesses are Muslims from the Middle East and Indonesia: "I don't like those people, they tip bad and their house always smells." R5354. Defense counsel challenged M.R. for cause based on his questionnaire, but due to the time pressures of the court's *voir dire* procedures, mistakenly stated that the reason for the challenge was that M.R. was a sexual assault victim, rather than this juror harbored a strong ethnic bias. R2721:4-7. In its haste to select the jury, the trial court apparently failed to review the relevant page of the questionnaire, instead summarily denying the challenge for cause. R2721:8. Had the trial court addressed the ethnic bias that was patently obvious on M.R.'s questionnaire, it surely would have excused him for cause. Instead, Mr. Al-Turki had to waste a peremptory challenge on M.R. to ensure that he would not serve. R2744:5-9.

impartial jury. *See Ham v. South Carolina*, 409 U.S. 524, 527 (1973) (due process requires that defendant be permitted to question prospective jurors about potential racial bias in cases where facts raise race issues); *Maes v. District Court*, 180 Colo. 169, 175-76, 503 P.2d 621, 624-25 (1972) ("That *voir dire* inquiry is permissible into matters of racial prejudice in the interest of obtaining a fair and impartial jury is undisputed . . . .").

The few Colorado cases upholding time limitations on *voir dire* are easily distinguished.

* * *

MOTION FILED

FEB 12 2010

No. 09-700

IN THE
Supreme Court of the United States

HOMAIDAN AL-TURKI,
Petitioner,

v.

THE PEOPLE OF
THE STATE OF COLORADO,
Respondent.

On Petition for a Writ of Certiorari
to the Colorado Court of Appeals

MOTION FOR LEAVE TO FILE AND BRIEF OF THE KINGDOM OF SAUDI ARABIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Dewey & LeBoeuf LLP
Counsel for Amicus Curiae

Henry L. Solano*
Dewey & LeBoeuf LLP
1301 Avenue of the Americas
New York, NY 10019
Telephone: (212) 259-8000

* Counsel of Record

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

As *amicus curiae*, the Kingdom of Saudi Arabia, respectfully moves for leave of Court to file the accompanying brief under Supreme Court Rule 37.2(b). Counsel for Petitioner has consented to the filing of this brief and written consent has been filed with the Clerk of the Court; counsel for Respondent has withheld consent.[1]

The Kingdom of Saudi Arabia seeks to assure that its citizens abroad are accorded the rights and protections that are accorded to the citizens of their host countries. Saudi Arabia has a substantial interest in ensuring that its citizens are accorded a right to a fair trial when prosecuted in the United States and, in particular, that they do not suffer bias because they are Arabs or Muslims.

Therefore, *amicus curiae* respectfully requests that the Court grant leave to file this brief.

---

[1] Counsel of record for all parties received notice of *amicus curiae's* intent to file this brief at least ten days prior to its due date.

Respectfully submitted,

Dewey & LeBoeuf LLP

Henry L. Solano*
Dewey & LeBoeuf LLP
1301 Avenue of the Americas
New York, NY 10019
Telephone: (212) 259-8000

*Counsel of Record

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY 2

REASONS FOR GRANTING THE WRIT 4

THE LIMITED *VOIR DIRE* PROCEEDINGS CONDUCTED BY THE COLORADO TRIAL COURT 4

THE PROSECUTION'S ANTI-MUSLIM STATEMENTS 7

SPECIAL CIRCUMSTANCES WARRANTING CONSTITUTIONAL PROTECTION EXIST 7

CONCLUSION 8

TABLE OF CITED AUTHORITIES

CASES — PAGE(S)

Davis v. Georgia,
429 U.S. 122 (1976) 8

Ham v. South Carolina,
409 U.S. 524 (1973) 4, 8

Morford v. U.S.,
339 U.S. 28 (1986) 4

Parker v. Gladden,
385 U.S. 363 (1966) 8

People v. Al-Turki,
No. 06CA2104, slip op. at 22
(10th Cir. Jan. 22, 2009) 5

Ristaino v. Ross,
424 U.S. 589 (1976) 8

Rosales-Lopez v. U.S.,
451 U.S. 182 (1981) 4

Turner v. Murray,
476 U.S. 28 (1986) 4, 8

MISCELLANEOUS

American-Arab Anti-Discrimination Committee Research Institute, *Report on Hate Crimes and Discrimination Against Arab Americans 2003-2007* (2008) 2

Initiative to Combat Post-9/11 Discriminatory Backlash, http://www.justice.gov/crt/legalinfo/nordwg_mission.php (last viewed on December 17, 2009) 2

Saudi students await the sentencing of Homaidan al Turki case (August 30, 2006), http://www.aawsat.com/english/news.asp?section=1&id=6198 (last viewed December 17, 2009) 2

INTEREST OF THE *AMICUS CURIAE*

The Kingdom of Saudi Arabia ("Kingdom" or "Saudi Arabia") respectfully submits this *amicus curiae* brief to inform this Court of Saudi Arabia's concerns with Petitioner's claims that he was deprived of the right to a fair and impartial jury through prejudicial error committed by a trial judge in the State of Colorado and to underscore the important reasons for the Court to grant the writ petition.[2]

The government of Saudi Arabia seeks to assure that its citizens abroad are accorded the rights and protections that are accorded to the citizens of their host countries. Saudi Arabia has a substantial interest in ensuring that its citizens receive a fair trial when prosecuted in the United States and, in particular, that they do not suffer bias because they are Arabs or Muslims.

This case has been closely followed at the highest levels of the government of Saudi Arabia. The issue raised herein is of importance to the Saudi people, including the several thousand Saudi students attending colleges and universities in the United States who have followed the case with the concern that nationals of Saudi Arabia may be

---

[2] Pursuant to Rule 37.6 of the Court, *amicus* affirms that no counsel for a party has authored this brief in whole or in part and that no person or entity other than *amicus* or its counsel has made any monetary contribution to the preparation or submission of this brief.

deprived of the right to trial by impartial jury that is accorded to U.S. citizens.[3]

The government of Saudi Arabia notes that the documented adverse environment and disparate treatment of Arabs and Muslims was not appropriately recognized nor adequately addressed by the judicial branch of Colorado in the presence of an exceptionally aggressive prosecutorial arm of Colorado's executive branch.[4]

SUMMARY

This case involves the right of a criminal defendant to obtain the benefit of trial by an impartial jury, as provided by the Sixth Amendment to the Constitution of the United States and applied to the states through the Fourteenth Amendment.

Petitioner, a Saudi national and a Muslim, was convicted in 2006 of unlawful sexual contact,

---

[3] August 30, 2006, Asharq Alawsat, "Saudi students await the sentencing of Homaidan al Turki case," http://www.aawsat.com /english/news.asp?section=1&id=6198 (last viewed December 17, 2009).

[4] See examples of the Arab/Muslim victimization or discrimination identified by the United States Department of Justice, Civil Rights Division, Initiative to Combat Post-9/11 Discriminatory Backlash, http://www.justice.gov/crt/ legalinfo/nordwg_mission.php (last viewed on December 17, 2009) and the American-Arab Anti-Discrimination Committee Research Institute's "Report on Hate Crimes and Discrimination Against Arab Americans 2003-2007" (2008) at 34, (describing hate crimes and forms of discrimination expressed against Arab-Americans).

extortion, false imprisonment, conspiracy to commit false imprisonment, and theft in connection with his alleged treatment of Z.A., a female Muslim housekeeper from Indonesia.

Petitioner was denied rights guaranteed under the United States Constitution when the trial court seated a juror who had advised the trial court that his views about Islam might impair his ability to render an impartial verdict. Notwithstanding that this revelation of actual bias occurred prior to the trial court's administration of the jury service oath, Petitioner's request to excuse this juror for cause or to allow additional *voir dire* was still denied. Under these special circumstances, the decision to seat juror C.M. violated Petitioner's Sixth Amendment right to trial by an impartial jury and his Fourteenth Amendment right to due process.

The Colorado Court of Appeals ratified this constitutional error by ruling that a juror's revelation of bias must be unequivocal throughout *voir dire*. This constitutional violation was exacerbated because the prosecutorial arm of Colorado capitalized on the trial court's error by conspicuously playing to the jury's anti-Arab/anti-Muslim bias throughout the trial.

Thus, the State of Colorado, through its executive (prosecutorial) and judicial branches, has deprived Petitioner of the federal constitutional protections due to him. Accordingly, Saudi Arabia requests this Court to review whether the state trial court complied with its obligation to excuse jurors, or at least permit questioning of their prejudices during

voir dire, in cases where the overall circumstances and surroundings present the likelihood of racial and religious bias.

REASONS FOR GRANTING THE WRIT

At numerous critical points in history, the United States Supreme Court has vindicated the right to an impartial jury of a defendant that belongs to a protected class or a disenfranchised group by protecting access to *voir dire* by the accused when special circumstances exist suggesting a high-likelihood that veniremen may harbor prejudices toward the defendant's class or group. *Ham v. South Carolina*, 409 U.S. 524 (1973); *Turner v. Murray*, 476 U.S. 28 (1986); *Morford v. U.S.*, 339 U.S. 258 (1950); *accord Rosales-Lopez v. U.S.*, 451 U.S. 182 (1981).

Since a case by case review is undertaken in order to determine whether "special circumstances" exist, a careful review of the facts in the proceedings below is critical to understanding the Kingdom's concern as presented in Petitioner's Petition for Writ of Certiorari. These facts clearly demonstrate that the potential for bias was inextricably intertwined with the substance of this Arab-Muslim's trial.

THE LIMITED *VOIR DIRE* PROCEEDINGS CONDUCTED BY THE COLORADO TRIAL COURT

The Colorado trial court's very limited oral *voir dire* process with the 106 members of the venire panel (of which Juror C.M. was number seventy-one)

emphasized the general inquiry of whether the jurors would "be able to base their decision(s) strictly on the evidence presented." *See e.g.* (R:2629:15-17). Relying on panel members to raise their hands in response to general questions, the trial court never asked if any individual venire member harbored anti-Muslim or anti-Arab biases or attitudes.[5] With only forty-five minutes (thirty seconds per potential juror) to examine the entire jury pool, Petitioner could not meaningfully probe attitudes regarding Juror C.M.'s ethnicity and religious faith. (R2635:9-12.)

Just before the *petit* jury was empanelled, C.M. tried repeatedly to raise his *admitted* bias. (R2751:24-25.) C.M. expressed in various ways his concern that Petitioner's religion, which "has come to light" and "will be at issue here" places "the laws of God . . . higher than the laws of man." (R2754:19-2755:4.) He stated that he had not spoken up previously thinking it unlikely that he would be seated on the jury.[6] C.M. advised that he was "more

---

[5] The written juror questionnaire completed by all prospective jurors, asked whether they had any "reaction" to the fact that the case involved Muslims. *People v. Al-Turki*, No. 06CA2104, slip op. at 22 (10th Cir. Jan. 22, 2009). The absence of any recorded "reaction" by C.M. on that questionnaire, however, did not establish the absence of bias, especially given his subsequent revelations and the oblique wording of the question.

[6] Although possessing a high number, he was the last potential juror seated as a *petit* juror. Neither defense counsel nor the State questioned C.M. during the limited period permitted by the trial court. (Defense counsel: "[H]is number was in the '70s and we just - - neither counsel got there.") (R2756:21-2757:2.)

likely to believe" that Petitioner "would commit a crime" to the extent his religion conflicted with the laws of the United States. C.M. went on to state: "notwithstanding the facts presented, if it came to a situation where it was a he said, she said issue, my bias may be altered based on the belief [Petitioner] would be obeying religion versus law." (R2754:24-2755:5 and R2755:14-17.)

The juror bias issue occurred late on the first day after one of the prosecutors announced a need to leave due to a child care pick up issue. (R2750:24-2751:6.) The trial court, noting it was late and the jury commissioner's office was closed, expressed concern that we "don't want to lose the progress we've made [in empanelling the petit jury **before the end of the day**]" by excusing Juror C.M. (R2754:1-5.) Thus, instead of probing C.M.'s "issue with **that** religion," i.e. Islam (emphasis added), the trial court summarily concluded that C.M. was not expressing "any problem with" his duty to base his decision on the evidence and the applicable "legal principles." (R2756:1-8 and R2755:18-25.) The court immediately empanelled the jury, simply noting that C.M. had "previously indicated" in the *voir dire* that he could be "fair and impartial." (R2756:10-14.)

Juror C.M. was seated as the last action of the first trial day over Petitioner's objection and request for limited *voir dire* in order to probe further C.M.'s bias against Petitioner. (R2757:5-6 and R2756:21-2757:4.)

THE PROSECUTION'S ANTI-MUSLIM STATEMENTS

The State's case was organized around a theme designed to incite bias. The prosecution began its case by calling out the word "hijab," defining it as "an Arabic term" that "means to isolate or to hide from view or to conceal" and presenting a mannequin wearing a hijab to the jury as its first trial exhibit. The State continued to build its case around the incendiary theme that the wearing of the hijab rendered Z.A. invisible, using the word "invisible" to describe Z.A. six times in its opening argument. (R2789:20; R2792:3; R2792:12; R2795:20; R2797:9; R2803:18; *see also* R2803:19-20).

Seeking to bolster Z.A.'s uncorroborated testimony, the prosecution interrupted their direct examination of Z.A. to put on an "expert" in "Islamic and Muslim culture" and "women's issues." (R3434:18-3435:4). The bias theme permeated the trial, as set forth in further detail in the Petition for Writ of Certiorari at 5-7.

SPECIAL CIRCUMSTANCES WARRANTING CONSTITUTIONAL PROTECTION EXIST

The United States government, through its laws and judicial system, has sought to ensure that all individuals, regardless of race, ethnicity or religious belief, are treated fairly and justly.

These safeguards include the constitutional guarantee to a trial before an impartial jury, as set

forth in the Sixth Amendment. A corollary to this constitutional guarantee is the ability of the parties to seek *voir dire* of potential jurors for possible bias when there is a "significant likelihood" that racial or similarly dangerous prejudice might infect the jurors' deliberations and their ability to fairly and impartially consider the evidence and issue a verdict. *Ristaino v. Ross*, 424 U.S. 589, 598 (1976); *accord Turner v. Murray*, 476 U.S. 28 (1986); *Ham v. South Carolina*, 409 U.S. 524 (1973).

Here, a potential juror expressed a bias against Muslims. The court did not question the juror about this bias and refused to allow Petitioner to question the juror. In light of the prevalence of anti-Muslim and anti-Arab sentiment in the United States, this case was one in which there was a "significant likelihood" that racial, ethnic and/or religious bias might taint jury deliberations and impair the jurors' ability to be fair and impartial.

CONCLUSION

A criminal defendant is entitled by the Sixth and Fourteenth Amendments to the United States Constitution to have twelve unbiased jurors. As this Court noted in *Parker v. Gladden*, 385 U.S. 363, 366 (1966), "Petitioner was entitled to be tried by twelve, not nine or ten [or as here simply eleven], impartial and unprejudiced jurors." *See also Davis v. Georgia*, 429 U.S. 122 (1976). Petitioner was denied rights under the United States Constitution to trial by an impartial jury when as a matter of expediency over constitutionally warranted caution Juror C.M. was

seated as the twelfth juror despite his expression of actual bias against Muslims. This miscarriage of justice raises concern within the government of Saudi Arabia as to whether the right to a trial by an impartial jury afforded to U.S. citizens in state courts is equally available to Saudi nationals.

Accordingly, the Kingdom of Saudi Arabia respectfully requests that this Court grant Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

Dewey & LeBoeuf LLP

Henry L. Solano*
Dewey & LeBoeuf LLP
1301 Avenue of the Americas
New York, NY 10019
Telephone: (212) 259-8000

* Counsel of Record

Counsel for Amicus Curiae

MOTION FILED
FEB 8 - 2010

(2)

No. 09-700

IN THE

Supreme Court of the United States

HOMAIDAN AL-TURKI,

Petitioner,

v.

COLORADO,

Respondent.

On Petition for a Writ of Certiorari
to the Colorado Court of Appeals

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE COLORADO CRIMINAL DEFENSE BAR AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Counsel for Amici Curiae:

Mark G. Walta*
WALTA, GEHRING,
HARMS & DINGLE LLC
1912 Logan Street
Denver, CO 80203
(303) 953-5999

*Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Amici curiae, the National Association of Criminal Defense Lawyers and the Colorado Criminal Defense Bar, respectfully move for leave of Court to file the accompanying brief under Rule 37.2(b). *Amici* timely notified both parties of their intention to file a brief. Petitioner has consented to the filing of an *amici curiae* brief; Respondent has withheld consent. Both parties' written responses are on file with the Court.

Amici and their respective members are committed professionally and personally to protecting the rights of the criminally accused. Among the pantheon of rights afforded criminal defendants under our Constitution, the right to a fair trial before an impartial jury is, perhaps, the most sacrosanct.

Contrary to this Court's teachings in *Ristaino v. Ross*, 424 U.S. 589 (1976), and *Ham v. South Carolina*, 409 U.S. 524 (1973), Colorado law dispenses with the need for probing *voir dire* of prospective jurors who have conveyed a constitutionally significant, or invidious, prejudice, absent a "clear" or "unequivocal" expression of bias on the part of the juror. In so doing, the State of Colorado has run afoul of minimal federal constitutional requirements.

Amici and their membership have a deep and abiding interest in ensuring that state jury selection procedures comport with federal constitutional standards, and therefore respectfully request that the Court grant leave to file this brief.

Respectfully submitted,

Mark G. Walta*
1912 Logan Street
Denver, CO 80203
(303) 953-5999

* Counsel of Record for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER 1

INTRODUCTION AND INTEREST OF THE *AMICI CURIAE* 1

SUMMARY 3

REASONS FOR GRANTING THE WRIT 6

1. COLORADO'S ANOMALOUS "CLEAR" OR "UNEQUIVOCAL" EXPRESSION OF BIAS STANDARD IS THE PRODUCT OF CARELESSNESS AND A COMPLETE DISREGARD FOR THIS COURT'S PRIOR PRONOUNCEMENTS 7

2. COLORADO'S REFUSAL TO ACKNOWLEDGE THE "SIGNIFICANT LIKELIHOOD" OF BIAS TEST, OR TO ADOPT EVEN LESS RESTRICTIVE STANDARDS FOR ALLOWING CRIMINAL DEFENDANTS TO PROBE POTENTIALLY INVIDIOUS PREJUDICES, HAS PLACED IT OUTSIDE THE NATIONAL MAINSTREAM 11

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Carrillo v. People, 974 P.2d 478 (Colo. 1999) 4,8
Chiappe v. State Personnel Board, 622 P.2d 527 (Colo.1981) 7 n.3
Commonwealth v. Christian, 389 A.2d 545 (Pa. 1978) 11
Commonwealth v. Grace, 352 N.E.2d 175 (Mass. 1976) 11
Cupp v. Murphy, 412 U.S. 291 (1973) 3
Fields v. People, 732 P.2d 1145 (Colo. 1987) 7
Ham v. South Carolina, 409 U.S. 524 (1973) ..... passim
Hernandez v. State, 742 A.2d 952 (Md. 1999) 11
Irvin v. Dowd, 366 U.S. 717 (1961) 2, 6
Mitchell v. State, 335 S.E.2d 150 (Ga. App. 1985) 11
Morgan v. People, 624 P.2d 1331 (Colo. 1981) 8
People v. Harlan, 8 P.3d 448 (Colo. 2000) 7, 9
People v. Harrell, 247 N.W.2d 829 (Mich. 1976) 11
People v. Luman, 994 P.2d 432 (Colo. App. 1999) 9
People v. Nailor, 200 Colo. 30, 612 P. 2d 79 (1980) 8
People v. Peeples, 616 N.E.2d 294 (Ill. 1993) 11
People v. Tyburski, 518 N.W.2d 441 (Mich. 1994) 11
People v. Wilborn, 82 Cal.Rptr.2d 583 (Cal. App.- 2d Dist. 1999) 11
People v. Wilson, 114 P.3d 19 (Colo. App. 2004) 9
People v. Young, 16 P.3d 821 (Colo. 2001) 9
Reynolds v. Commonwealth, 367 S.E.2d 176 (Va. App. 1988) 11
Ristaino v. Ross, 424 U.S. 589 (1976) ..... passim
Rosales-Lopez v. United States, 451 U.S. 182 (1981) 5

State v. Altergott, 559 P.2d 728 (Haw. 1977) 11
State v. Barnes, 547 A.2d 584 (Conn. App. 1988) 11
State v. Cason, 454 S.E.2d 888 (S.C. 1995) 11
State v. Clark, 981 S.W.2d 143 (Mo. 1998) 11
State v. Davis, 10 P.3d 977 (Wash. 2000) 11
State v. Roy, 681 So.2d 1230 (La. 1996) 11
State v. Thomas 798 A.2d 566 (Md. App. 2002) 11
Turner v. Louisiana, 379 U.S. 466 (1965) 2
Turner v. Murphy, 476 U.S. 28 (1986) 7
Wainwright v. Witt, 469 U.S. 412 (1985) 9

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE COLORADO CRIMINAL DEFENSE BAR AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

INTRODUCTION AND INTEREST OF THE *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a professional bar association committed to the mission of securing justice and due process for persons accused of crime or other misconduct. Founded in 1958, NACDL currently represents more than 12,800 direct members – and 94 state, local, and international affiliate organizations with another 35,000 members – including private criminal defense lawyers, public defenders, United States military defense counsel, law professors, and judges.

The Colorado Criminal Defense Bar ("CCDB") is a statewide professional association of attorneys, investigators, and paralegals dedicated to representing persons accused of crime. Founded in 1979 by a committed few, CCDB now claims approximately 1000 active members. CCDB is affiliated and aligned with NACDL, in mission, function, and goals.

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person, other than *amici* and their counsel, made a monetary contribution to its preparation or submission. Consistent with Rule 37.3, counsel of record for both parties were timely-notified of *amici*'s intent to file a brief in support.

Amici regularly advocate for, and defend, the rights of the criminally accused in both state and federal courts. *Amici* and their respective members have a strong interest in protecting and advancing the rights of criminal defendants, and a particular interest in safeguarding the right to trial by an impartial jury, which lies at the heart of due process. *E.g., Irvin v. Dowd,* 366 U.S. 717, 721-22 (1961). As practitioners who appear regularly in state and federal courts on behalf of those accused of criminal misconduct, the members of NACDL and CCDB have a special interest in promoting and maintaining the overall fairness and impartiality of criminal proceedings.

State jury selection procedures that restrict a criminal defendant's ability to probe prospective jurors, through questioning, for invidious bias or prejudice strike at the core of the Sixth and Fourteenth Amendments' collective guarantee of "a fair trial by a panel of impartial, 'indifferent' jurors[.]" *Turner v. Louisiana*, 379 U.S. 466, 471 (1965) (citation omitted). Colorado state courts, in contravention of this Court's prior pronouncements in *Ham v. South Carolina*, 409 U.S. 524 (1973), *Ristaino v. Ross*, 424 U.S. 589 (1976), and subsequent cases, have held that there is no entitlement to probe a prospective juror for prejudice – even invidious prejudice – absent a "clear" or "unequivocal" expression of bias on the part of the juror.

Amici are gravely concerned that Colorado's impermissibly restrictive, and ultimately misguided, approach to juror questioning has impaired (and will continue to impair) the fundamental fairness of criminal trials conducted throughout that state. More broadly, *amici* and their membership fear that, absent intervention from this Court, other states might be inclined to similarly limit the ability of criminal

defendants to probe prospective jurors for invidious bias and prejudice. Finally, *amici* are troubled any time a state refuses to adhere to, or otherwise ignores, Supreme Court precedent establishing baseline constitutional requirements related to the conduct of criminal trials.

As Justice Douglas aptly observed, "[e]rosions of constitutional guarantees usually start slowly, not in dramatic onsets." *Cupp v. Murphy*, 412 U.S. 291, 304 (1973) (dissenting in part). *Amici*'s interest in Mr. Al-Turki's case is that it illustrates, in rather stark terms, how the incremental erosion of bedrock federal constitutional principles at the state-level can lead to monumental collapses in the fairness and impartiality of criminal proceedings. When state jury selection procedures fail to comport with federal constitutional standards, the overall fairness of criminal trials is inevitably undermined. As professional organizations whose membership have demonstrated a long-standing commitment to defending the rights of the criminally accused, *amici* have a unique and lasting interest in seeing that the United States Constitution's promise of a fair trial before an impartial jury is fully-realized.

SUMMARY

This case concerns a criminal defendant's elemental right to be tried by an impartial jury, as guaranteed by the Sixth Amendment to the Constitution of the United States, and as applicable to the states through the Fourteenth Amendment to the Constitution.

In 2006, a Colorado jury convicted Petitioner, a Saudi national and a Muslim, of unlawful sexual contact, extortion, false imprisonment, conspiracy to commit false imprisonment, and theft. The charges in question arose from Petitioner's purported exploitation of a live-in female housekeeper from Indonesia.

Petitioner is currently serving an indeterminate sentence of twenty-eight years to life in the Colorado Department of Corrections.

This was a highly-publicized prosecution that intersected sensitive issues of ethnicity, religion, and nationality. As the trial court was preparing to swear in the petit jury, a juror felt compelled to alert the court that he held certain views about Islam, and adherents to the Muslim faith, that might impair his ability to be fair and impartial.[2] The trial court refused to excuse the juror, and furthermore declined to allow additional questioning of the juror to probe his expressions of possible bias or prejudice. The court ultimately seated the juror over Petitioner's repeated objections. Playing upon some of the very concerns expressed by this juror, the prosecution repeatedly injected Islamic culture and putative Muslim practices into the trial proceedings.

The Colorado Court of Appeals, relying primarily on language culled from *Carrillo v. People*, 974 P.2d 478, 488 (Colo. 1999), affirmed the trial court's decision to seat the juror without allowing further inquiry into the juror's expression of possible bias. Pet. App. 16a. The court of appeals reasoned that, absent a "clear" or "unequivocal" expression of bias or prejudice on the part of the juror, the trial court retained the

---

[2] More specifically, the juror expressed the view that Muslims believed "the laws of God are higher than the laws of man," and even went so far as to assert that "notwithstanding the facts presented, if it came to a situation where it was a he said, she said issue, my bias may be altered based on the belief [Petitioner] would be obeying religion versus law." Pet. App. 13-14a.

discretionary authority to preclude additional questioning. *Id.*

This Court, in a line of cases stretching from *Ham v. South Carolina*, 409 U.S. 524, 527 (1973), to *Rosales-Lopez v. United States*, 451 U.S. 182, 189-90 (1981), and beyond, consistently has held that trial courts must allow criminal defendants to probe prospective jurors for bias whenever there exists a "significant likelihood" that racial or similarly invidious prejudices might hinder the juror's ability to sit fairly and impartially. This unbroken line of authority has failed to penetrate Colorado law: no reported Colorado case acknowledges this Court's adoption of the "significant likelihood" of bias test, and, indeed, there is scant mention of *Ham* or any of its progeny in state appellate cases reported in the thirty-seven years since *Ham's* decision.

The refusal on the part of Colorado courts to acknowledge, much less heed, Supreme Court precedent in this area has led to the development of state jury selection procedures that fall short of federal constitutional requirements. Colorado's unwillingness to embrace the "significant likelihood" of bias test, or to adopt even less restrictive standards for allowing criminal defendants to probe potentially invidious prejudices, has placed it outside the national mainstream.

Petitioner's case is illustrative of how constitutionally deficient jury selection procedures can fatally undermine the Sixth and Fourteenth Amendments' collective promise of a fair trial before an impartial jury. In a criminal prosecution suffused with religious and ethnic overtones, a juror who expressed genuine concerns about his ability to render a fair and impartial verdict, due to certain preconceptions about Petitioner's religious faith, was nevertheless allowed to

sit on the jury, without any inquiry into his expressions of potential bias. Because Colorado law barters in absolutes by requiring "clear" or "unequivocal" expressions of bias, a prospective juror who indicates a potential – or even a probable – invidious bias may nonetheless be permitted sit on a jury, without any additional inquiry whatsoever.

Accordingly, *amici* respectfully request that the Court intervene in this case and grant the petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

"'A fair trial in a fair tribunal is a basic requirement of due process.' [...] In the ultimate analysis, only the jury can strip a man of his liberty or his life. [Therefore], a juror must be as 'indifferent as he stands unsworne.'" *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (citations omitted). The United States Constitution's basic assurance of a fair trial before an impartial jury is under threat. Colorado's studious avoidance of this Court's precedent has led to the development of jury selection practices that are unmoored from federal constitutional mandates and that are out of step with jury selection practices nationwide. Intervention by this Court is required to draw Colorado back into the constitutional fold.

1. COLORADO'S ANOMALOUS "CLEAR" OR "UNEQUIVOCAL" EXPRESSION OF BIAS STANDARD IS THE PRODUCT OF CARELESSNESS AND A COMPLETE DISREGARD FOR THIS COURT'S PRIOR PRONOUNCEMENTS.

There is not a single reported case in Colorado acknowledging this Court's repeated admonition that, when there exists "a constitutionally significant likelihood" that racial or other invidious prejudices might affect a juror's ability to sit impartially, a criminal defendant must be permitted to probe the juror for bias or prejudice through additional questioning. *E.g.*, *Ristaino v. Ross*, 424 U.S. 589, 596-97 (1976) (discussing *Ham v. South Carolina*, 409 U.S. 524, 527 (1973)); *accord Turner v. Murphy*, 476 U.S. 28, 33 (1986) (plurality opinion); *Rosales-Lopez v. United States*, 451 U.S. 182, 189-90 (1981). Indeed, in the wake of this Court's decision in *Ham* nearly four decades ago, only two published, Colorado cases have referenced *Ham* and its progeny (and, even then, only in passing).[3] *See People v. Harlan*, 8 P.3d 448, 461-62 (Colo. 2000) (citing *Ham*, *Rosales-Lopez*, and *Turner* for certain generic principles); *Fields v. People*, 732 P.2d 1145, 1160 (Colo. 1987) (Vollack, J., dissenting) (citing *Ristaino* for proposition that proportional representation on juries not necessary to ensure impartiality).

Although *Ham*, *Ristaino*, and subsequent cases have been virtual strangers to Colorado law, it is only in the last decade that the state has deviated so markedly from the constitutional baselines established by these

---

[3] One other case, *Chiappe v. State Personnel Board*, 622 P.2d 527, 531 n.6 (Colo. 1981), cites to Justice Douglas's dissent in *Ham* for a proposition unrelated to jury selection.

cases. For instance, in both *People v. Nailor*, 200 Colo. 30, 32, 612 P. 2d 79, 80 (1980), and *Morgan v. People*, 624 P.2d 1331, 1332 (Colo. 1981), the Colorado Supreme Court endorsed the view that a prospective juror should not only be subject to further scrutiny, but, in most instances, excused, when his or her fairness or impartiality "appears doubtful." However, *Nailor* went further and concluded that the juror's expressed "doubts" in that case not only suggested bias, but, in fact, amounted to "a clear expression of bias" warranting the juror's dismissal. 200 Colo. at 32, 612 P. 2d at 80. In so doing, *Nailor* arguably sowed the seeds that would lead to the development of the heightened "clear" and "unequivocal" expression of bias standard.

Nearly two decades after its opinion in *Nailor*, the Colorado Supreme Court decided *Carrillo v. People*, 974 P.2d 478 (Colo. 1999). One of the issues before the court in *Carrillo* was whether a prospective juror, who both admitted to a personal relationship with the victim's father and expressed doubts about his ability to be fair and impartial, should have been excused for cause. 974 P.2d at 486. Alluding to its prior decision in *Nailor*, the supreme court opined that the defendant's challenge to the prospective juror was properly denied, because his expressions of possible bias "appear[ed] ambiguous and fail[ed] to articulate *a clear expression of bias* requiring his dismissal." *Id.* at 488 (emphasis added). Thus, with the stroke of a pen, the supreme court transformed a seemingly benign, parenthetical observation in *Nailor* into a legal standard that severely restricts the ability of criminal defendants to ferret out invidious prejudice among prospective jurors.

Since *Carrillo*, Colorado courts have applied the "clear" or "unequivocal" expression of bias standard in a number of reported cases, with varying results.

Compare People v. Wilson, 114 P.3d 19, 25 (Colo. App. 2004) (finding "unequivocal" expression of bias), and *People v. Luman*, 994 P.2d 432, 436 (Colo. App. 1999) (same) *with People v. Young*, 16 P.3d 821, 826 (Colo. 2001) (finding no "clear" expression of bias), and *Harlan*, 8 P.3d at 464 (finding expressions of bias merely "equivocating"). As evidenced by both these cases, and Petitioner's case, this standard is uniquely susceptible to uneven application. The disparate outcomes arrived at in these cases strongly suggest that the standard is both impracticable and inequitable.

The Colorado standard is impracticable for the simple reason that it defies common-sense. Any judge or experienced practitioner can attest that "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). That is precisely why this Court has never required that juror bias be proved with "unmistakable clarity." *Id.* Expressions of invidious bias will often be muted or veiled. Only the most ignorant – or those most eager to avoid jury service altogether – are likely to stand before a court of law and readily admit an inability to be fair and impartial based on considerations of race, religion or ethnicity.

The challenge in crafting jury selection procedures that give effect to the constitutional imperative of a fair trial before an impartial jury lies not in identifying those jurors with clear or obvious biases, but rather in rooting out the much murkier impulses and beliefs that sometimes underlie suggestions of invidious bias. The "clear" or "unequivocal" bias standard repeatedly has proven itself incapable of meeting this challenge. If Colorado law is not up to the task of confronting juror bias in its most pernicious form, the law is irretrievably broken. What *Ham* and its progeny recognize, and what

Colorado law ignores, is that the greatest threat to the promise of a fair trial is not the obviously-biased juror, but the juror who has expressed potentially invidious biases that are left unexplored.

The Colorado standard is also inherently inequitable. Criminal prosecutions that implicate issues of race, religion, or national origin also tend to surface potentially invidious biases on the part of jurors. Yet, because such biases are commonly intimated or implied (when they are expressed at all), the "clear" or "unequivocal" bias standard rarely will be met. The practical effect of Colorado's impossibly high standard is that, in those cases where invidious prejudice has the greatest potential to impact the fairness of the proceedings, the ability to probe jurors for such bias is often at its most limited.

Over the course of nearly four decades, this Court has made abundantly clear that when there exists "a constitutionally significant likelihood" that racial or other invidious prejudices might affect a juror's ability to sit impartially, a criminal defendant must be permitted to probe the juror for bias or prejudice through additional questioning. *E.g.*, *Ristaino*, 424 U.S. at 596-97. The State of Colorado, as it did in Petitioner's case, has steadfastly refused to heed this admonition.

2. COLORADO'S REFUSAL TO ACKNOWLEDGE THE "SIGNIFICANT LIKELIHOOD" OF BIAS TEST, OR TO ADOPT EVEN LESS RESTRICTIVE STANDARDS FOR ALLOWING CRIMINAL DEFENDANTS TO PROBE POTENTIALLY INVIDIOUS PREJUDICES, HAS PLACED IT OUTSIDE THE NATIONAL MAINSTREAM.

Numerous courts nationwide have affirmed the importance of allowing adequate inquiry into the potential biases of prospective jurors. *See, e.g, State v. Barnes*, 547 A.2d 584, 587 (Conn. App. 1988); *State v. Thomas* 798 A.2d 566, 537 (Md. App. 2002); *People v. Tyburski*, 518 N.W.2d 441, 447-49 (Mich. 1994); *State v. Clark*, 981 S.W.2d 143, 147 (Mo. 1998).

And, unlike Colorado, a number of states have expressly recognized the applicability of the "significant likelihood" of bias test fashioned by this Court. *See People v. Wilborn*, 82 Cal.Rptr.2d 583, 586-87 (Cal. App.- 2d Dist. 1999); *Mitchell v. State*, 335 S.E.2d 150, 151-52 (Ga. App. 1985); *State v. Altergott*, 559 P.2d 728, 732-33 (Haw. 1977); *People v. Peeples*, 616 N.E.2d 294, 311 (Ill. 1993); *State v. Roy*, 681 So.2d 1230, 1240-41 & n.9 (La. 1996); *Hernandez v. State*, 742 A.2d 952, 956 (Md. 1999); *Commonwealth v. Grace*, 352 N.E.2d 175, 181 (Mass. 1976); *People v. Harrell*, 247 N.W.2d 829, 831 (Mich. 1976); *Commonwealth v. Christian*, 389 A.2d 545, 547 n.5 (Pa. 1978); *State v. Cason*, 454 S.E.2d 888, 890 (S.C. 1995); *Reynolds v. Commonwealth*, 367 S.E.2d 176, 180 (Va. App. 1988); *State v. Davis*, 10 P.3d 977, 997 (Wash. 2000).

Finally, the American Bar Association Principles for Jury Trials ("ABA Principles") reflect a growing consensus that inquiries into potential bias on the part of prospective jurors should be liberally allowed. *See* ABA Principles, Principle 11.B.4 (adopted 2005) ("Where there is reason to believe that jurors have been

previously exposed to information about the case or for other reasons are likely to have preconceptions concerning it, the parties should be given liberal opportunity to question jurors individually about the existence and extent of their knowledge and preconceptions.").

The foregoing illustrates that Colorado's restrictive approach to probing potentially invidious bias in jurors is out of step with mainstream practices. This deviation from national and constitutional norms has consequences. The legitimacy of our criminal justice system rises or falls on its perceived fairness and impartiality. When a juror insinuates that his or her verdict might be driven by some impermissible animus toward the defendant, and that juror is allowed to sit without any further inquiry, the basic fairness and impartiality of the proceedings are necessarily open to question. Colorado's approach needlessly invites such questions and, in so doing, undermines the legitimacy or our criminal processes.

CONCLUSION

For the above reasons, *amici* respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

Mark G. Walta
Counsel of record
WALTA, GEHRING,
HARMS & DINGLE LLC
1912 Logan Street
Denver, CO 80203
(303) 953-5999

February 8, 2010